Supreme Court, U. S.
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No.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1980.

CHARLES D. BONANNO LINEN SERVICE, INC.,
PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD
AND
TEAMSTERS LOCAL UNION NO. 25, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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Question Presented.

Did the court below err in holding that an employer member of a multi-employer bargaining unit violates the National Labor Relations Act, 61 Stat. 140 (1947), as amended, 29 U.S.C. § 158(a)(5), by unilaterally withdrawing from said unit upon the occurrence of an impasse in collective bargaining negotiations, for the purposes of negotiating individually with the union, and thereafter refusing to execute the multi-employer agreement, where such an opinion is contrary to the decision of five circuit courts of appeals on the same issue?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Charles D. Bonanno Linen Service, Inc. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit in the above entitled case.

Opinions Below.

The opinion issued by the court of appeals is reported at — F. 2d — (1st Cir. 1980), and is reproduced in Appendix A of this petition. The Supplemental Decision and Order of the National Labor Relations Board was issued on August 6,

1979, is reported at 243 NLRB No. 140, and is reproduced in Appendix B of this petition. The National Labor Relations Board's initial Decision and Order was issued on June 29, 1977, is reported at 229 NLRB 629 and is reproduced in Appendix C of this petition.

Jurisdiction.

The court of appeals issued its opinion enforcing the order of the National Labor Relations Board on September 12, 1980. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Applicable Statutory Provision.

The statute involved is the National Labor Relations Act, as amended 61 Stat. 136, 713 Stat. 519, 29 U.S.C. § 151 et seq. The relevant sections are 29 U.S.C. 158(a)(1) and (5). The pertinent text is as follows:

§ 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

Statement of the Case.

On October 27, 1976, the parties agreed to stipulate to most of the essential facts which relate to the instant matter. Although the testimony adduced at the hearing before the Administrative Law Judge revealed some disagreement as to details, there is no real disagreement as to the essential facts. The facts as recited herein were, in effect, adopted by the Administrative Law Judge during the course of his decision, (Appendix C) and were not disturbed in the subsequent proceedings.

The New England Linen Supply Association (hereinafter "the Association") was a group of twelve employers engaged in the linen supply and service industry who joined together for the purpose of engaging in collective bargaining with Teamsters Local Union No. 25 (hereinafter "the Union")[1] on a multi-employer basis. Charles D. Bonanno Linen Service, Inc., (hereinafter "Bonanno") had been a member of the Association for several years. Bonanno was a signatory to a collective bargaining agreement covering the period from September 21, 1972 to April 18, 1975.

In accordance with that agreement the Union and Association each gave notice of termination. Bonanno authorized the Association to bargain with the Union in its behalf.

Commencing in April, 1975, the Association and the Union engaged in negotiations for the purpose of executing a new agreement. After several negotiating sessions a proposed contract which provided for compensation of employees on an hourly basis was submitted to the Union membership for ratification. After the employees rejected that contract, the Union at the next meeting proposed that its driver members be compensated on a commission basis rather than on an hourly rate. This position was rejected by the Association in accordance with its prior negotiating position. On May 15 an impasse in bargaining was reached over the issue of the method of compensating drivers.

On June 23, 1975 the Union called a selective strike against Bonanno and the remaining Association members locked out their drivers. Subsequent meetings were held, but the parties were unable to resolve the continuing impasse.[2]

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[1] The Association no longer exists. Bargaining between the Union and former Association members has been on an individual Company basis.

[2] In testimony before the Administrative Law Judge evidence was adduced that the Union met separately with two individual members of the Association. There is no record evidence that separate interim agreements were executed.

On November 21, 1975 Bonanno advised the Association and the Union that it was withdrawing from the Association. Thereupon, the remaining members of the Association terminated the lockout.[3]

After several meetings without Bonanno the Association and Union reached an agreement on a new contract on April 13, 1976. By letter dated April 29, 1976, the Union for the first time informed Bonanno that it considered Bonanno to be bound by the agreement reached with the Association. By letter dated May 3, 1976, Counsel for Bonanno advised the Union that Bonanno was not bound by the agreement referred to in the Union's letter of April 29.

As a result of an unfair labor practice charge filed by the Union, the National Labor Relations Board (hereinafter "the Board") summarily affirmed the decision of an Administrative Law Judge, holding that Bonanno violated Section 8(a)(1) and (5) of the National Labor Relations Act, ("the Act") as amended, 61 Stat. 136, 140, 29 U.S.C. 158(a)(1) and (5), by refusing to execute the collective bargaining agreement reached between the Association and the Union 229 NLRB 629 (1977) (Appendix C. 70).

Thereafter, Bonanno applied for review and the Board applied for enforcement of its Order to the United States Court of Appeals for the First Circuit (Case No. 77-1279). After Bonanno had filed its brief, the Board filed, and the court granted, a motion for leave to withdraw the certified list filed in lieu of record in order to reconsider its decision.

The Board sought enforcement of its Supplemental Decision and Order with the Court of Appeals for the First Circuit. The court of appeals enforced the decision of the Board.[4]

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[3] The strike against Bonanno is still in effect.

[4] On October 6, 1980 the First Circuit entered an order staying its decree until entry of the final decision of this Court upon a petition for writ of certiorari to be filed by Bonanno.

Reasons for Granting the Writ.

The decision by the Court of Appeals for the First Circuit below conflicts with the decisions of five other circuit courts[5] on the question of whether an employer may withdraw from a multi-employer bargaining unit upon the occurrence of an impasse in collective bargaining negotiations.

A decision by this Court is necessary to resolve the extant conflict among the circuits in order that a uniform federal law be established on the issue. A decision by this Court upholding the reasoning of the five circuit courts which have resolved the issue *contra* to the First Circuit will have the salutary effect of balancing the conflicting legitimate interests of employers and unions, by allowing an employer to withdraw from multi-employer bargaining once it becomes clear that bargaining within that framework has become nothing more than an exercise in futility.[6]

Multi-employer bargaining has been recognized as "a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining." *Labor Board* v. *Truck Drivers Union Local 449*, 353 U.S. 87 at 95 (1957). In the main both employers and unions derive substantial benefits from bargaining in this manner. As the court of appeals stated in its decision herein:

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[5] *NLRB* v. *Independent Association of Steel Fabricators*, 582 F. 2d 135 (2d Cir. 1978), *cert. denied*, 439 U.S. 1130 (1979); *NLRB* v. *Beck Engraving Co.*, 522 F. 2d 475 (3d Cir. 1975); *NLRB* v. *Hi-Way Billboards, Inc.*, 500 F. 2d 181 (5th Cir. 1974); *Fairmont Foods Co.* v. *NLRB*, 471 F. 2d 1170 (8th Cir. 1972); *NLRB* v. *Associated Shower Door Co., Inc.*, 512 F. 2d 230 (9th Cir. 1975), *cert. denied*, 423 U.S. 893 (1975).

[6] According to the United States Department of Labor, in its study of contracts covering 1,000 or more employees, there are 648 multi-employer bargaining agreements, covering more than three million employees. United States Department of Labor, *Characteristics of Major Collective Bargaining Agreements*, 12 (Bulletin 2065, April, 1980) January 1, 1978.

> Multi-employer bargaining offers advantages to both management and labor. It enables smaller employers to bargain "on an equal basis with a large union" and avoid "competitive disadvantages resulting from non-uniform contractual terms" *NLRB* v. *Truck Driver Local 449*, 353 U.S. 87, 96 (1957). At the same time, it facilitates the development of industry-wide, worker benefit programs that employers otherwise might be unable to provide. . . Finally, by permitting the union and employers to concentrate their bargaining resources on the negotiation of a single contract, multi-employer bargaining enhances the efficiency of the collective bargaining process and thereby reduces industrial strife. *NLRB* v. *Bonanno*, — F. 2d — (1st Cir. 1980) (Appendix A. 21-22).

However, as demonstrated by this case, the aforementioned desirable results of multi-employer bargaining can not always be achieved. In fact, subsequent to the occurrence of an impasse in negotiations between the Association and the Union, almost eleven months passed before agreement between the parties was reached. During this breakdown in negotiations Bonanno was subjected to a selective strike by the Union and, as a result, most of the remaining members of the Association locked out their drivers. Faced with this stalemate in bargaining Bonanno, after six months of the status quo, concluded that the salutary purposes of multi-employer bargaining had been destroyed by the continuing impasse in negotiations. Therefore, on November 21, 1975, Bonanno advised the Union and Association that it was revoking its prior authorization to the Association to bargain on its behalf and would henceforth bargain directly with the Union.

Bonanno's withdrawal from the Association raises the question as to what circumstances will warrant an employer's withdrawal from multi-employer bargaining once negotia-

tions have commenced. The Board's view of the right of withdrawal which was adopted in *Retail Associates, Inc.*, 120 NLRB 388, 395 (1958) is as follows: Once negotiations between the multi-employer group and union have commenced, an employer's withdrawal from the group is untimely and ineffective unless justified by "unusual circumstances," or by consent granted by the union. The Board has narrowly construed those unusual circumstances which will justify withdrawal during negotiations between a multi-employer group and a union. Such action is sanctioned in but two instances. If an employer can demonstrate that it is faced with dire financial circumstances, circumstances in which the very existence of an employer as a viable business entity has ceased or is about to cease, such as impending bankruptcy, the withdrawal will not violate the Act. See: *Hi-Way Billboards, Inc.*, 206 NLRB 22, 23 (1973); *U.S. Lingerie Corporation*, 170 NLRB 750, 751 (1968); *Spun-Jee Corp.*, 171 NLRB 557, 558 (1968). The Board will also find unusual circumstances justifying unilateral withdrawal on a showing that the multi-employer group has been significantly dissipated by reason of consensual withdrawals. The Board reasons that further unilateral withdrawals will not significantly affect public or private interests in effective multi-employer bargaining. See: *Connell Typesetting Company*, 212 NLRB 918, 921 (1974); *Typographic Service Co.*, 238 NLRB No. 211 (1978).

However, the Board has maintained that the occurrence of an impasse in negotiations is not an "unusual circumstance" justifying withdrawal. See, e.g., *Hi-Way Billboards, Inc.*, 206 NLRB 22 (1973); *Charles D. Bonanno Linen Service, Inc.*, 243 NLRB No. 140 (1979) (Appendix B. 41). In so doing they have characterized impasse as only a temporary "deadlock" or "hiatus" in negotiations. In view of the foregoing, the Board held that Bonanno's withdrawal from the Association was ineffective, and its subsequent refusal to execute the

collective bargaining agreement violated § 8(a)(5) of the Act.

Aside from the First Circuit, all of the courts of appeals which have considered the issue have concluded that an impasse in multi-employer bargaining is an unusual circumstance within the meaning of *Retail Associates, supra.* In each case the courts held that an employer's unilateral withdrawal from group bargaining was justified.[7] As the Eighth Circuit held in *Fairmont Foods Company* v. *NLRB,* 471 F. 2d 1170, 1172 (8th Cir. 1972):

> When an impasse in negotiations is reached, withdrawal by a member of a multi-employer bargaining group is excused (citations omitted). This means, of course, that it cannot be bound by a subsequent agreement between a union, having knowledge of the withdrawal, and the other employers.

In *NLRB* v. *Hi-Way Billboards, Inc.,* 500 F. 2d 181 (5th Cir. 1974), the court disagreed with the Board and joined the *Fairmont* Court in concluding that an employer's withdrawal from multi-employer bargaining on the reaching of an impasse was justified. The court viewed the Board's decision as follows:

> "We are impressed with the cogency of the Board's reasoning insofar as the Board's decision would protect the interests of the Union and of the employees in the multi-employer unit. But we have doubts about the fairness of the decision to the employer members of the unit." *Supra* at 183.

The Second, Third and Ninth Circuits have all concluded, in agreement with the Fifth and Eighth Circuits, that the occurrence of an impasse does justify an employer's unilateral

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[7] Such an action does not necessarily extinguish an employer's bargaining obligation. After withdrawal an employer would normally bargain with the union on an individual basis, as Bonanno offered to do in this case.

withdrawal from a multi-employer bargaining group. *NLRB* v. *Independent Association of Steel Fabricators, Inc.*, 582 F. 2d 135, 146 (2d Cir. 1978), *cert. denied*, 439 U.S. 1130 (1979); *NLRB* v. *Beck Engraving Company*, 522 F. 2d 475, 483 (3d Cir. 1975); *NLRB* v. *Associated Shower Door Co., Inc.*, 512 F. 2d 230, 232 (9th Cir. 1975), *cert. denied*, 423 U.S. 893 (1975).

In the context of multi-employer collective bargaining a union has at its disposal the ability to create severe fragmentation of the multi-employer group. Upon the occurrence of an impasse in bargaining it is permissible for a union to engage in separate negotiations with individual employer members of the group leading to execution of separate interim agreements.[8] In effect, the Board has held that a union may withdraw from multi-employer negotiations with respect to one or more employers and negotiate separate interim agreements with those employers. *Plumbers Union No. 323*, 191 NLRB 592 (1971);[9] *Sangamo Construction Co.*, 188 NLRB 159 (1971). Such agreements engender a *de facto* withdrawal of employer signatories from the multi-employer group.

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[8] Although the Board professes a desire to apply the rules concerning withdrawal equally among union and employers in the multi-employer context, *The Evening News Association, etc.*, 154 NLRB 1494 (1965), *enforced sub. nom., Detroit Newspaper Publishers Association* v. *NLRB*, 372 F. 2d 569 (6th Cir. 1967) such an evenhanded policy breaks down by the sanctioning of a union's right to negotiate separate interim agreements with some members of the multi-employer group. By contrast, it would be an unfair labor practice for an employer to deal directly with an individual union where unions join together for bargaining purposes. *NLRB* v. *General Electric*, 418 F. 2d 736 (2d Cir. 1969).

[9] Unlike the situation in *Plumbers Union No. 323*, 191 NLRB 592 (1971) the Union here struck Bonanno alone, presumably in an effort to "... exert pressure on a single employer or to whipsaw the Association by picking off individual employer members ..." *supra* at 596. After impasse the Union attempted to fragment the Association by engaging in a selective strike against Bonanno, and

The Board has concluded that such agreements prevent significant fragmentation of the multi-employer group, rather than cause such fragmentation, and tend to facilitate the breaking of an impasse. *Charles D. Bonanno Linen Service, Inc.*, 243 NLRB No. 140 (1979), (Appendix B. 51). Such a conclusion by the Board patently ignores the realities of multi-employer bargaining. The execution of such agreements in fact causes considerable fragmentation and weakening of the unity and strength of the multi-employer group. See, e.g., *NLRB* v. *Hi-Way Billboards, Inc., supra* at 183; *NLRB* v. *Beck Engraving Co., supra* at 482-3; *NLRB* v. *Independent Association of Steel Fabricators, supra* at 147; *NLRB* v. *Associated Shower Door, supra* at 232. Those employers who execute interim agreements are producing or operating their businesses while their competitors, the remaining members of the multi-employer group, remain mired in a continuing labor dispute. Moreover, such interim agreements often grant concessions which the other employers are unwilling to grant. In sum, interim agreements fragment the unit, even if such agreements are temporary, allowing some employers to avoid the hardship of a strike and forcing others to lose the benefits of the composite strength for which the multi-employer group was created.

The courts which have considered the issue (with the exception of the First Circuit) have uniformly concluded that in balancing the conflicting legitimate interests of the parties in the multi-employer bargaining context, an employer must be allowed to withdraw from a multi-employer group upon impasse. These courts concluded that such an "impasse doctrine" is necessary in order to offset the power of a union to

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subsequently by holding separate meetings with individual Association members presumably in an effort to negotiate separate agreements. See: *NLRB* v. *Beck Engraving Co.*, 522 F. 2d 475, 483 (3d Cir. 1975); *Fairmont Foods Co.* v. *NLRB*, 471 F. 2d 1170, 1174 n.1 (8th Cir. 1972); *NLRB* v. *Callier*, — F. 2d —, — (8th Cir. 1980).

destroy the effectiveness of such a group by negotiating separate interim agreements. The position of these courts was succinctly summarized by the Third Circuit in *NLRB* v. *Beck Engraving Co.*, 522 F. 2d 475, 482-3 (3d Cir. 1975) as follows:

> As we have noted, the Board has enunciated the even-handed principle that its regulations for withdrawal from multi-employer bargaining units are the same for unions and employers. *The Evening News Association, supra,* 154 NLRB at 1501 (1965). Its subsequent decisions have reflected an effort to effectuate this policy. For example, the Board has held in a series of opinions that a union may withdraw from a multi-employer bargaining unit with respect to one or more, but not all, employers if the withdrawal is timely and unequivocal. *Pacific Coast Association,* 163 NLRB No. 129, pp. 892-899 at 896 (1967); *Hearst Consolidated Publications, Inc.,* 156 NLRB No. 16, 210-212 (1965) *enforced sub nom., Publishers Association of New York City* v. *NLRB,* 364 F. 2d 293 (2d Cir.), *cert. denied,* 385 U.S. 971 (1966) . . . *The Evening News Association,* 154 NLRB No. 121, 1494 (1965), *enforced sub nom., Detroit Newspaper Publishers Association* v. *NLRB,* 372 F. 2d 569, 572 (6th Cir. 1967). In substance these cases merely apply the *Retail Associates* rule, *supra,* 120 NLRB 393-395, to the union as well as the employer.
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> But the Board has not contented itself with this approach. Instead, it has given its imprimatur to the union's negotiation of interim, separate agreements with individual members of the multi-employer bargaining unit. *P. H. C. Mechanical Contractors,* 191 NLRB No. 121, pp. 592-596 (1971); *Sangamo Construction Company,* 188 NLRB No. 26, 159-163 (1971). *The undeniable import of this policy is that the union may reach agree-*

ments with one or more employers of the bargaining unit and then whipsaw the remaining employers of the bargaining unit. It is not sufficient to say, as the Board does, that such an arrangement does not preclude an individual employer from reaching an individual and interim accord with the union. Rather, the point is that each individual agreement strengthens the union's hand vis a vis those employers who continue to bargain within the unit. Moreover, *allowing individual negotiations even on an interim basis is tantamount to a rejection of the existence of the multi-employer bargaining unit. We believe it inconsistent to say that the union and some employers may act on an individual basis while other employers within the same unit, relegated to this posture by the union's refusal to negotiate with them on an individual basis, must adhere to group bargaining.* The union, under the Board's own policy, should not have been given two weapons for its economic arsenal (i.e. the selective strike and individual negotiations) while the employers are given only one (viz., the lockout). *We believe that the Board's approval of individual, interim agreements during multi-employer bargaining and without requiring withdrawal from the multi-employer bargaining unit is sufficient cause for according the employer an equivalent right.* See: *Fairmont Foods Co.* v. *NLRB*, 471 F. 2d 1170 at 1174, n.1 (8th Cir. 1972). *Moreover, the Board's decisions and its stated policy of applying its rules equally to both Union and employer require us also to conclude that a negotiating impasse justifies an employer's unilateral withdrawal from the multi-employer bargaining unit.*

We therefore, join the Ninth, Fifth and Eighth Circuits and hold that a negotiating impasse justifies unilateral withdrawal from a multi-employer bargaining unit.

NLRB v. *Associated Shower Door Co., Inc.*, 512 F. 2d 230 at 232 (9th Cir. 1975), *petition for cert.* filed 44 U.S.L.W. 3062 (U.S. July 23, 1975) (No. 75-127); *NLRB* v. *Hi-Way Billboards, Inc.*, 500 F. 2d 181 at 183-184 (5th Cir. 1975); *Fairmont Foods Co.* v. *NLRB, supra*, at 471 F. 2d 1170 at 1172-1173 and 1174, n.1. (Emphasis supplied.)

Prior to the decision by the First Circuit here, the Second Circuit joined its sister circuits in sanctioning an employer's unilateral withdrawal from a multi-employer group once an impasse in negotiations had been reached. In *NLRB* v. *Independent Association of Steel Fabricators*, 582 F. 2d 135 (2d Cir. 1978) the court concluded that:

> The rule against untimely withdrawal is designed to preserve the stability of multi-employer bargaining which would be impaired if an employer could withdraw whenever it found the results of such bargaining uncongenial or if it felt that it could use the threat of withdrawal as bargaining leverage ... By the same token, however, the objectives of collective bargaining would be ill served by compelling employers to remain in the bargaining unit once it becomes clear that no progress is being made within that framework. Thus, all the circuits which have addressed the issue have concluded that a genuine impasse in negotiations will justify an employer's unilateral withdrawal from multi-employer bargaining. (Citations omitted), *supra* at 146.[10]

Bonanno attempted to reach an agreement with the Union within the framework of the Association. Despite the target-

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[10] In the most recent circuit court pronouncement on the issue, the Ninth Circuit, reaffirmed its conclusion that an impasse in bargaining justifies an employer's unilateral withdrawal from multi-employer bargaining. *H & D, Inc.* v. *NLRB*, — F. 2d —, No. 79-7198, 105 LRRM 3070 (9th Cir. October 8, 1980). The Ninth Circuit stated in *H & D*,

> Recently, this court declared in *Authorized Air Conditioning Co.* v. *NLRB*, 606 F. 2d 899 (9th Cir. 1979), citing cases from

ing of it by the Union for a selective strike, Bonanno endeavored for more than six months after the onset of an impasse between the parties to come to terms with the Union within the context of group bargaining. It was only after Bonanno realized the futility of such efforts that its withdrawal from the Association was effectuated.[11] Having endured the impasse and prolonged selective strike for a substantial period of time, it appeared to Bonanno that the efficiency and effectiveness of bargaining through the Association as contemplated by this Court in *NLRB* v. *Truck Drivers*, 353 U.S. 87, 95 (1957) had been seriously diminished. Moreover, contrary to this Court's hope that multi-employer bargaining would lead to the reduction of industrial strife and "the effectuation of the national labor policy of promoting labor peace through strengthened collective bargaining," *supra*, at 95, the selective strike against Bonanno and the impasse continued for six months. In view of the situation, Bonanno effectuated its withdrawal from the Association.[12]

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the Second, Third, Fifth, Eighth and Ninth Circuits that "(t)he Courts of Appeals have consistently recognized an impasse in negotiations as justification for a unilateral withdrawal from a multi-employer unit." 606 F. 2d at 907. While the Board argues on this appeal that its position, considering the competing policy considerations, is compelling and entitled to judicial acceptance, and that in recent cases the courts' misconceptions of the Board's rulings have been clarified, these contentions are not persuasive and appear to be disposed of in *NLRB* v. *Associated Shower Door Co.*, 512 F. 2d 230, 232, 88 LRRM 3024 (9th Cir. 1975), and *NLRB* v. *Beck Engraving Co.*, 522 F. 2d 475, 90 LRRM 2089 (3rd Cir. 1975). We find no cogent reason at this time to challenge the position taken by this court in *Authorized Air Conditioning Co.* v. *NLRB, supra.*

[11] By letter dated November 21, 1975 to the Association's negotiating committee, a copy of which was sent to Herbert Salter, the Union's Representative, Bonanno gave notice of revocation of its bargaining authorization previously granted to the Association, and its intent to engage in direct negotiations with the Union.

[12] This course of action was in accord with the state of the law as enunciated by the decisions of the courts in *NLRB v. Beck Engraving Co., supra; NLRB* v. *Associated Shower Door, supra; NLRB* v. *Hi-Way Billboards, Inc., supra; Fairmont Foods Co.* v. *NLRB, supra.*

As found by the Administrative Law Judge, before Bonanno withdrew two other employer members of the Association secretly were in contact with the union "presumably in an effort to make a separate settlement." (Appendix C. 57). Notwithstanding those contacts no interim agreements were executed in this case.

It is submitted that an employer's right to withdraw from a multi-employer group should not be made contingent upon the exercise by a union of its admitted right to negotiate separate interim agreements. Rather, in order to insure effectuation of the Board's stated principle that its regulations for withdrawal from multi-employer bargaining units are to be applied equally to unions and employers, *The Evening News Association,* 154 NLRB at 1501 (1965), it is logical to conclude that in response to a union's right to negotiate separate interim agreements upon the occurrence of impasse, an employer should be granted a concomitant right to withdraw from a multi-employer group.

In *NLRB* v. *Beck Engraving Co.,* 522 F. 2d 475 (3d Cir. 1975), the court concluded that an impasse in bargaining justifies withdrawal despite the lack of evidence in that case that the union had attempted to negotiate any separate interim agreements. In so doing the *Beck* court stated:

> The employer's right to withdraw during a bargaining impasse cannot be made contingent upon the union's prior exercise of its right to negotiate individual interim agreements. The rights of the parties should accrue simultaneously based upon the occurrence of an event which neither can manipulate (e.g., impasse). Were the rule otherwise, the party whose right accrues first would be given a tremendous bargaining advantage and leverage. *Supra* at 483.

The decision of the First Circuit adopts the Board's conclusion that an impasse in bargaining is not an "unusual circumstance" within the meaning of *Retail Associates.* However, while rejecting the decisions of its five sister circuit courts

and its own prior leanings,[13] the First Circuit nonetheless recognized that a union's unrestricted right to negotiate separate interim agreements necessarily weakens the employer's ability to resist the union's economic pressures. "Withdrawal by unit members and their negotiation of separate contracts obviously would reduce the efficiency of the bargaining process." *NLRB* v. *Bonanno*, — F. 2d — (1st Cir. 1980). (Appendix A. 22).

The First Circuit concedes that: "employers have no direct means of countering the union's ability to negotiate individual agreements." (Appendix A. 31). Despite recognition of the adverse impact of separate interim agreements on multi-employer bargaining, the court, in contravention of the unanimity of the other circuit court decisions on the issue has nonetheless chosen to adopt the Board's view. In the main the court's holding is grounded upon its belief that under the circumstances the proper course of action would be to defer to the Board's "specialized judgment." (Appendix A. 36).

While it is true that judicial review is limited, *NLRB* v. *Truck Drivers Local 449*, 353 U.S. 87, 96 (1957), that does "not mean that the balance struck by the Board is immune from judicial examination and reversal in proper cases." *Labor Board* v. *Brown*, 380 U.S. 278 (1965).

Courts have a statutory obligation to set aside Board decisions which rest upon an erroneous legal conclusion. 29 U.S.C. § 160(e)(f). As this Court stated in *Brown*, at 292:

> [W]here, as here, the review is not of a question of fact, but of a judgment as to the proper balance to be struck between conflicting interests, "[t]he deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by

[13] See *NLRB* v. *Field and Sons*, 462 F. 2d 748 (1st Cir. 1972); *Jaime Andino d/b/a Jaime Andino Trucking* v. *NLRB*, — F. 2d —, No. 79-1133, Slip op. at 8 (1st Cir. April 25, 1980).

Congress." *American Shipbuilding Co.* v. *Labor Board, post* at 318.

Courts must of course, set aside Board decisions which rest on "an erroneous legal foundation." *Labor Board* v. *Babcock and Wilcox, supra,* at 112-113. Congress has not given the Board untrammeled authority to catalogue which economic devices shall be deemed freighted with indicia of unlawful intent. *Labor Board* v. *Insurance Agents, supra* at 498.

All of the circuit courts, with the notable exception of the First Circuit, have accepted this Court's directive and have fulfilled their obligation of judicial review of the Board's decisions on the issue presented by this case. They have concluded that a balancing of "conflicting interests" in multi-employer bargaining mandates that an employer be granted a right to withdraw at impasse.

A decision by this Court is necessary to resolve the conflict among the circuits created by the decision by the First Circuit below. Such a decision upholding an employer's withdrawal will resolve the issue with finality. It will also insure that the Board's professed desire to equalize the regulations governing union and employer withdrawal rights from multi-employer bargaining will be effectuated.

Conclusion.

For the reasons set forth above, this Court should issue a writ of certiorari to review the decision of the court below and after granting such a writ, to reverse the decision of the First Circuit Court of Appeals.

Respectfully submitted,

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Appendix A.

United States Court of Appeals
For the First Circuit

No. 79-1524

NATIONAL LABOR RELATIONS BOARD,

PETITIONER,

and

TEAMSTERS LOCAL UNION NO. 25, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

INTERVENOR,

v.

CHARLES D. BONANNO LINEN SERVICE, INC.,

RESPONDENT.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before

CAMPBELL and BOWNES, *Circuit Judges*, and DAVIS, *Judge.**

John G. Elligers, Attorney with whom *William A. Lubbers*, General Counsel, *John E. Higgins, Jr.*, Deputy General Counsel, *Robert E. Allen*, Acting Associate General Counsel, *Elliott Moore*, Deputy Associate General Counsel, and *Standau E. Weinbrecht*, Attorney, were on brief for petitioner.

Sidney A. Coven, with whom *Howard I. Wilgoren*, and *Lepie and Coven* were on brief, for respondent.

James T. Grady, with whom *Gabriel O. Dumont, Jr.*, and *Grady and McDonald* were on brief, for intervenor.

September 12, 1980

* Of the United States Court of Claims, sitting by designation.

BOWNES, *Circuit Judge.*

Pursuant to § 10(e) of the National Labor Relations Act, 29 U.S.C. § 160(e), the National Labor Relations Board (the Board) petitions for enforcement of a decision[1] which it concedes is contrary to the pronouncements of five circuit courts. At issue is whether the occurrence of an impasse in the course of collective bargaining enables an employer unilaterally to withdraw from a multiemployer bargaining unit and thereafter negotiate with the union on an individual basis. Rejecting the various court decisions indicating otherwise as misguided, the Board concluded that an employer's withdrawal upon occurrence of a bargaining impasse is unjustified and violative of §§ 8(a)(5) and (1) of the Act. In so holding, the Board reaffirmed a position to which it has tenaciously adhered since 1973. For the reasons set forth below, we enforce the Board's order.

I.

The factual findings of the Administrative Law Judge are undisputed. Charles D. Bonanno Linen Service, Inc. (Bonanno) is a Massachusetts corporation engaged in the laundering, rental and distribution of linen products. The truck drivers and helpers employed by Bonanno, as well as by other linen supply companies in the area, have been represented by the Teamsters Local Union No. 25 (the Union). For the purpose of negotiating with the Union concerning the terms of

[1] The Board actually filed two decisions in this case. The first, issued on May 12, 1977 and reported at 229 NLRB 629 (1977), was a summary affirmance of the Administrative Law Judge's opinion and order. The Board subsequently sought leave to reconsider its decision, and for that reason we suspended the respondent's petition for review on October 26, 1977. On August 6, 1979, the Board affirmed its initial opinion in a supplemental decision, reported at 243 NLRB No. 140, 1979-80 CCH NLRB ¶ 16,090 (1979), enforcement of which is now sought.

employment of these workers, Bonanno for several years has joined with nine of its competitors in a multiemployer unit called the New England Linen Supply Association (the Association). Bonanno was a signatory to the most recent contract negotiated between the Association and the Union, which covered the period from September 21, 1972 to April 18, 1975. On February 19, 1975, Bonanno authorized the Association's negotiating committee to represent it in the anticipated negotiations for a new contract, and Bonanno's president became a member of that committee.

The Union and the Association held bargaining sessions throughout March and April of 1975. On April 30, a proposed contract was agreed upon by the negotiators, but was rejected by the Union members four days later. By May 15, the parties had reached an impasse over the issue of compensation: the Union demanded that the employees be paid on a commission basis, while the Association insisted that they continue to receive payment at an hourly rate. When several subsequent meetings proved unsuccessful in breaking the impasse, the Union on June 23 initiated a selective strike against Bonanno. In response, most of the Association members locked out their drivers. The stalemate continued throughout the summer, with the negotiators unable to agree upon a method of payment during their sporadic meetings. During this time, two employers secretly conferred with the Union, "presumably in an effort to make a separate settlement." No such agreement, however, was executed, nor was there any evidence that these contacts even reached the level of negotiations.

On November 21, by which time it had hired permanent replacements for all of its striking drivers, Bonanno notified the Association by letter that it was "withdrawing from the Association with specific respect to negotiations at this time because of an ongoing impasse with Teamsters Local 25." On

the same day, Bonanno mailed a copy of its revocation letter to the Union and read it over the phone to a Union representative. Shortly thereafter, the Association terminated the lockout and informed the Union that it wished to continue negotiations on a multiemployer basis. Several negotiating sessions were conducted between December and April. On April 13, 1976, the Union abandoned its demand for payment by commission and accepted a management offer of a revised hourly wage rate. With this development, the parties quickly reached agreement on a new contract, dated April 23, 1976, and given retroactive effect to April 18, 1975.

On April 9, 1976, the Union filed the present action, alleging that Bonanno's purported withdrawal from the multiemployer bargaining unit constituted an unfair labor practice. By letter dated April 29, 1976, the Union for the first time informed Bonanno that the Union had never consented to its withdrawal and therefore considered Bonanno to be bound by the settlement just reached. Bonanno denied it was bound by the contract in a reply letter dated May 3, 1976.

II.

Crucial to any examination of the right of withdrawal from a multiemployer bargaining arrangement is an understanding of the private and public interests served by such an arrangement and the extent to which those interests would be undermined were a party free at any time to withdraw from the multiemployer unit. Multiemployer bargaining offers advantages to both management and labor. It enables smaller employers to bargain "on an equal basis with a large union" and avoid "the competitive disadvantages resulting from nonuniform contractual terms." *NLRB* v. *Truck Drivers Local 449*, 353 U.S. 87, 96 (1957). At the same time, it facilitates the development of industry-wide, worker benefit programs that employers otherwise might be unable to provide.

More generally, multiemployer bargaining encourages both sides to adopt a flexible attitude during negotiations; as the Board explains, employers can make concessions "without fear that other employers will refuse to make similar concessions to achieve a competitive advantage," and a union can act similarly "without fear that the employees will be dissatisfied at not receiving the same benefits which the union might win from other employers." *Brief* at 10. Finally, by permitting the union and employers to concentrate their bargaining resources on the negotiation of a single contract, multiemployer bargaining enhances the efficiency and effectiveness of the collective bargaining process and thereby reduces industrial strife. For these reasons, Congress has recognized multiemployer bargaining as "a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining." *NLRB* v. *Truck Drivers Local 449*, 353 U.S. at 95.

It is apparent that, absent some constraints on the parties' freedom to withdraw from a multiemployer unit during the course of negotiations, the utility of this bargaining process would be substantially undermined. Withdrawal by unit members and their negotiation of separate contracts obviously would reduce the efficiency of the bargaining process. Perhaps more importantly, if the withdrawing members were successful in obtaining more favorable contractual terms, their competitive advantage would encourage additional defections. In order to forestall such withdrawals, the unit's bargaining representative likely would adopt a more extreme position and a more intransigent approach, thereby diminishing the likelihood of a prompt and peaceful settlement. At the same time, a flat prohibition on withdrawal from a multiemployer unit during negotiations would be equally troublesome: such a rule would subvert each employer's interest in controlling its own labor relations, would cause injustice

whenever an employer developed a unique situation requiring individualized treatment, and would undermine the multiemployer bargaining process itself by discouraging involvement therein.

In an effort to balance these competing concerns, the Board in *Retail Associates, Inc.*, 120 NLRB 388 (1958), prescribed guidelines to govern withdrawal from multiemployer bargaining. Under these rules, an employer or union is free to withdraw from the multiemployer unit for any reason prior to the date set for renegotiation of the existing contract or the date on which negotiations actually commence, provided adequate written notice is given. Once negotiations towards a new contract have begun, however, a party may only withdraw if "mutual consent" is given or if "unusual circumstances" exist. *Id.* at 395 (dictum). This approach affords each party an opportunity to rescind its consent to multiemployer bargaining, but restricts unilateral withdrawal during the period when such action would jeopardize the viability and effectiveness of the bargaining process. Even then, however, a necessary measure of flexibility is provided by the "mutual consent" and "unusual circumstances" exceptions. We have recently endorsed the *Retail Associates* approach to multiemployer withdrawal.[2] *See Carvel Co.* v. *NLRB*, 560 F.2d 1030, 1034-35 (1st Cir. 1977), *cert. denied*, 434 U.S. 1065 (1978); *accord, e.g., McAx Sign Co., Inc.* v. *NLRB*, 576 F.2d 62, 67-68 (5th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979); *NLRB* v. *Sheridan Creations, Inc.*, 357 F.2d 245, 247-48 (1966), *cert. denied*, 385 U.S. 1005 (1967).

Since its delineation of the *Retail Associates* guidelines, the Board, with judicial approval, has consistently found "un-

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[2] Although in *NLRB* v. *Field & Sons, Inc.*, 462 F.2d 748, 749-50 (1st Cir. 1972), we expressed some hesitation concerning the inflexibility of the Board's approach, we subsequently disapproved of this dictum in *Carvel Co.* v. *NLRB*, 560 F.2d at 1035.

usual circumstances" to exist in two situations: where extreme financial pressures, such as impending bankruptcy, have threatened an employer's existence,[3] and where the bargaining unit has been substantially fragmented, such as through consensual withdrawals.[4] Whether the "unusual circumstances" exception also encompasses a bargaining impasse — the issue presented here — has invoked a more varied response. For many years, the Board failed to provide a clear-cut answer, first implying that impasse would not justify unilateral withdrawal, *see Ice Cream, Frozen Custard Indus. Employees,* 145 NLRB 865, 870 (1964), only to suggest later that it would. *See Plumbers & Steamfitters Local 323,* 191 NLRB 592, 592 n.1 (1971). In 1973, however, the Board unequivocally ruled that a bargaining impasse was not an "unusual circumstance" within the *Retail Associates* guidelines. *Hi-Way Billboards, Inc.,* 206 NLRB 22 (1973), *enforcement denied,* 500 F.2d 181 (5th Cir. 1974). It reasoned that an impasse did not signify the end of collective bargaining, but rather was a foreseeable stage in the bargaining process — "akin to a hiatus in negotiations" — which per-

[3] *See, e.g., Atlas Electrical Service Co.,* 176 NLRB 827, 830 (1969); *Spun-Jee Corp.,* 171 NLRB 557, 558 (1968); *United States Lingerie Corp.,* 170 NLRB 750, 751 (1968). *Compare, e.g., Universal Insulation Corp.,* 149 NLRB 1397, 1403 (1964), *enforced,* 361 F.2d 406 (6th Cir. 1966) (mere economic hardship resulting from multiemployer agreement not grounds for withdrawal).

[4] *See, e.g., NLRB* v. *Southwestern Colorado Contractors' Ass'n,* 447 F.2d 968, 969-70 (10th Cir. 1971); *Typographic Service Co.,* 238 NLRB No. 211, 1978-79 CCH NLRB ¶ 15,096 (1978); *Connell Typesetting Co.,* 212 NLRB 918, 921 (1974).

Although the Board apparently has never so held, several courts have also found "unusual circumstances" in instances where the negotiating committee does not fairly represent the interests of an employer. *See NLRB* v. *Siebler Heating & Air Conditioning, Inc.,* 563 F.2d 366, 371 (8th Cir. 1977), *cert. denied,* 437 U.S. 911 (1978); *NLRB* v. *Unelko Corp.,* 71 Lab. Cas. ¶13,764 (7th Cir. 1973) (dictum).

mitted the parties to "resort to forms of economic persuasion to establish the primacy of their negotiating position." *Id.* at 23. A rule permitting unilateral withdrawal upon impasse, the Board added, would "herald the demise of multiemployer bargaining," since a member could avoid its bargaining obligations by purposefully creating an impasse whenever "it was dissatisfied with the impending agreement." *Id.* at 23-24. Notwithstanding the Fifth Circuit's refusal to enforce the *Hi-Way Billboards* decision, 500 F.2d 181 (5th Cir. 1974), as well as subsequent expressions of judicial disapproval, the Board has tenaciously adhered to this position ever since[5] and has provided a spirited defense thereof in the instant case. 243 NLRB No. 140, 1979-80 CCH NLRB ¶ 16,090 (1979).

As the Board concedes, there are a number of appellate decisions that conclude, after analysis, that the occurrence of a genuine impasse does justify an employer's unilateral withdrawal from a multiemployer bargaining unit.[6] *See NLRB* v. *Independent Ass'n of Steel Fabricators, Inc.*, 582 F.2d 135, 146 (2d Cir. 1978), *cert. denied*, 439 U.S. 1130 (1979); *NLRB* v. *Beck Engraving Co., Inc.*, 522 F.2d 475, 483 (3d Cir. 1975); *NLRB* v. *Associated Shower Door Co., Inc.*, 512 F.2d 230, 232 (9th Cir.), *cert. denied*, 423 U.S. 893 (1975) (dictum); *NLRB* v.

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[5] *See, e.g., Seattle Auto Glass*, 246 NLRB No. 21, 1979-80 CCH NLRB ¶ 16,366 (1979); *Golden Bear Motors, Inc.*, 245 NLRB No. 30, 1979-80 CCH NLRB ¶ 16,315 (1979); *Marine Machine Works, Inc.*, 243 NLRB No. 141, 1979-80 CCH NLRB ¶ 16,089 (1979); *Florida Fire Sprinklers, Inc.*, 237 NLRB 1034, 1035 (1978); *Bill Cook Buick, Inc.*, 224 NLRB 1094, 1096 (1976).

[6] In addition, there are several cases — including one of our own — that express the same view in dictum, citing without analysis to one or more of the cases listed in the text. *See Jaime Andino d/b/a Jaime Andino Trucking* v. *NLRB*, No. 79-1133, slip op. at 8 (1st Cir. April 25, 1980); *Authorized Air Conditioning Co., Inc.* v. *NLRB*, 606 F.2d 899, 907 (9th Cir. 1979), *cert. denied*, 48 U.S.L.W. 3626 (April 1, 1980); *NLRB* v. *Acme Wire Works, Inc.*, 582 F.2d 153, 156-57 (2d Cir. 1978).

Hi-Way Billboards, Inc., 500 F.2d 181, 183-84 (5th Cir. 1974); *Fairmont Foods Co.* v. *NLRB*, 471 F.2d 1170, 1172 (8th Cir. 1972) (alternative holding). In fact, in its supplemental decision below, the Board endeavored at some length to rebut this line of cases as misguided and unpersuasive. Upon close analysis, however, all but one of these cases prove inapposite to, or otherwise distinguishable from, the situation at hand.

III.

Fairmont Foods Co. v. *NLRB*, 471 F.2d 1170 (8th Cir. 1972) — the first case to rule that an impasse justifies withdrawal — was decided prior to the Board's *Hi-Way Billboards* decision, at a time when its pronouncements on this issue were ambiguous and even contradictory. The court reached this conclusion, in the course of rejecting the Board's factual determination that no impasse existed, by relying on *Morand Bros. Beverage Co.*, 91 NLRB 409 (1950), *enforced in part*, 190 F.2d 576 (7th Cir. 1951) — a decision which the Board below characterized as "no longer valid."[7] More importantly, the Board in *Fairmont Foods* had adopted the trial examiner's rulings which themselves suggested that an impasse would justify withdrawal. 196 NLRB 849, 856 (1972). In reaching the same result, therefore, the Eighth Circuit

[7] Reasoning that the withdrawal rights of unions and employers should be at least similar if not coextensive, the Board in *Morand* accorded to unions the right to withdraw upon impasse after noting that, under its prior decisions, employers had "unlimited freedom" to withdraw "at any time . . . at their will or fancy." 91 NLRB at 418. The Board subsequently abandoned this hands-off approach in *Retail Associates*.

The *Fairmont Foods* court also relied, erroneously, on *Ice Cream, Frozen Custard Indus. Employees*, 145 NLRB 865 (1964). The Board's decision there, although ambiguous, suggested that an employer could withdraw upon impasse only if the union consented, *id.* at 870 — a position first enunciated in *Retail Associates*.

was merely articulating its perception of Board policy in effect at the time — a policy which the Board subsequently revamped in *Hi-Way Billboards.*

Three of the four remaining cases involved very similar factual settings. In *NLRB* v. *Hi-Way Billboards, Inc.*, 500 F.2d 181 (5th Cir. 1974), a negotiating impasse had been reached, a strike had been called, and the union had signed "interim" agreements with several members of the multiemployer unit. These agreements permitted the several employers to resume operations but required them to adhere to any unit-wide contract ultimately negotiated. The same circumstances existed in *NLRB* v. *Associated Shower Door Co., Inc.*, 512 F.2d 230 (9th Cir.), *cert. denied*, 423 U.S. 893 (1975), and *NLRB* v. *Independent Ass'n of Steel Fabricators, Inc.*, 582 F.2d 135 (2d Cir. 1978), *cert. denied*, 439 U.S. 1130 (1979), except that the individual agreements negotiated by the several employers were not interim in nature, but were final contracts designed to remain in effect regardless of the outcome of the group bargaining. In each case, a second group of multiemployer members asserted a right to withdraw unilaterally from the unit in response to such agreements; in each case, the court rejected the Board's ruling and held that the employers were entitled to withdraw and thus were not bound by the subsequently negotiated multiemployer agreement.[8]

Employing a similar analysis, the courts concluded in essence that a contrary result would be unfair to the employers comprising the bargaining unit.[9] Crucial to this as-

[8] In *Associated Shower Door,* however, the Ninth Circuit enforced the decision on alternative grounds, agreeing with the Board's conclusion that the withdrawing members' subsequent conduct constituted a "retraction" of their withdrawals. 512 F.2d at 232-33.

[9] *See NLRB* v. *Associated Shower Door Co., Inc.*, 512 F.2d at 232 ("it seems only fair" that withdrawal should be allowed under the

sessment was the Board policy that, once negotiations have begun, "a union may withdraw from a multi-employer unit with respect to one or more employers while continuing multi-employer bargaining with those employers remaining in the multiple unit." *NLRB* v. *Hi-Way Billboards, Inc.*, 500 F.2d at 183.[10] One concern was that this policy appeared to undercut the principle espoused in *Evening News Assoc.*, 154 NLRB 1494 (1965), *enforced sub. nom., Detroit Newspaper Publishers Assoc.* v. *NLRB*, 372 F.2d 569 (6th Cir. 1967), that all rules governing the right of withdrawal in the multiemployer context would be applied equally among employers and unions. But the greater concern was the impact of this policy on the remaining members of the multiemployer group, "who watched certain of their withdrawing competitors resume business while they themselves were still in the throes of an economic strike." *NLRB* v. *Independent Ass'n of Steel Fabricators, Inc.*, 582 F.2d at 147. The anticipated result of this arrangement, which all three courts deemed unacceptable, was that "a union could reach an agreement with one or more employers and then whipsaw the remaining members of the significantly fragmented and weakened multi-employer unit." *NLRB* v. *Associated Shower Door Co., Inc.*, 512 F.2d at 232, *quoted in NLRB* v. *Independent Ass'n of Steel Fabricators, Inc.*, 582 F.2d at 147 n.21; *accord,*

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circumstances); *NLRB* v. *Hi-Way Billboards, Inc.*, 500 F.2d at 183 ("we have doubts about the fairness of the decision to the employer members of the unit").

[10] The *Hi-Way Billboards* and *Associated Shower Door* courts erroneously relied on *Pacific Coast Ass'n of Pulp & Paper Manufs.*, 163 NLRB 892 (1967), to support this proposition. There, the Board merely upheld the right of unions to withdraw prior to the start of negotiations — a straightforward application of the *Retail Associates* guidelines. The quoted statement is nonetheless an accurate description of Board policy, with one qualification which we discuss below. *See* nn. 16 & 17 *infra.*

NLRB v. *Hi-Way Billboards, Inc.*, 500 F.2d at 183. At bottom, then, was a dissatisfaction with a perceived imbalance in relative bargaining strength.[11] In *NLRB* v. *Beck Engraving Co., Inc.*, 522 F.2d 475 (3d Cir. 1975), a case we discuss *infra*, the Third Circuit articulated this concern most emphatically: "The union, under the Board's own policy, should not have been given two weapons for its economic arsenal (i.e. the selective strike and individual negotiations) while the employers are given only one (viz., the lockout)." *Id.* at 483. Although acknowledging that its decision would "contribute ... to instability within the context of multi-employer bargaining," *id.*, the *Beck* court deemed it necessary, as did the other courts, to correct this imbalance by supplying the employers with a second weapon: the ability to withdraw from a multiemployer group upon impasse.[12]

For several reasons, we feel the approach adopted by these four courts is questionable. First, the Supreme Court has indicated that the legitimacy of any particular bargaining tactic

[11] As an alternative basis for its conclusion that impasse justifies withdrawal, the *Steel Fabricators* court indicated that "the objectives of collective bargaining would be ill-served by compelling employers to remain in the bargaining unit once it becomes clear that no progress is being made within that framework." 582 F.2d at 146. This result-oriented approach sacrifices the long-term value of stable multiemployer bargaining to the immediate goal of expediting the collective bargaining process. *See* Note, 45 Brooklyn L. Rev. 1283, 1305, 1317-18 (1979). It also, contrary to the Board's opinion, regards impasse as an unexpected and aberrant occurrence which signifies an irretrievable collapse in negotiations, rather than as a predictable, often temporary, and occasionally purposefully created stage in the bargaining process. Given the public and private interests served by multiemployer bargaining and the Board's expertise, we consider the Second Circuit's rationale an insufficient justification by itself to override the Board's considered judgment.

[12] The court in *Beck* suggested that the Board might prefer to effect an alternative equilibrium by forbidding unions from negotiating individual agreements. 522 F.2d at 484 n.15.

or weapon should be based solely on the pertinent statutory provisions, and not on any assessment of relative bargaining strength.[13] As a result, the balance of economic power arguably should have little bearing on the question whether impasse justifies withdrawal.[14] Second, even if a cataloguing of economic weapons were appropriate, the final tallies reached here are incomplete. The *Beck* court's two-to-one tabulation ignores, on the one hand, a union's ability to institute consumer picketing and to engage in "harassing tactics," *NLRB* v. *Insurance Agents' Int'l Union*, 361 U.S. 477, 480-81 (1960), and on the other an employer's ability, *inter alia*, to "legitimately blunt the effectiveness of an anticipated strike by stockpiling inventories, readjusting contract schedules, or transferring work from one plant to another . . . ." *NLRB* v. *Brown*, 380 U.S. 278, 283 (1965).[15] The balancing undertaken is thus somewhat imprecise.

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[13] *See American Ship Building Co.* v. *NLRB*, 380 U.S. 300, 317 (1965) (the Act does not "give the Board a general authority to assess the relative economic power of the adversaries in the bargaining process and to deny weapons to one party or the other because of its assessment of that party's bargaining power."); *NLRB* v. *Brown*, 380 U.S. 278 (1965); *NLRB* v. *Insurance Agents' Int'l Union*, 361 U.S. 477, 490, 497 (1960). This restriction, designed to effectuate the congressional intent that the Board not control the substantive terms of any collective bargaining agreement, *id.* at 485-87, apparently encompasses judicial actions as well: the Court in *Insurance Agents* indicated that the "substantive solution" of the parties' differences should be "unrestricted by any governmental power." *Id.* at 488.

[14] *See* Murphy, *Impasse and the Duty to Bargain in Good Faith*, 39 U. Pitt. L. Rev. 1, 60 (1977); Comment, 17 B.C. Indus. & Com. L. Rev. 525, 536-37 (1976).

[15] The sole employer weapon mentioned by the courts — the lockout — is itself a multi-faceted device. Not only can the nonstruck members of a multiemployer unit lock out their employees as a defense to a whipsaw strike against other unit members, *NLRB* v. *Truck Drivers Local 449*, 353 U.S. 87 (1957), but the struck members can hire permanent replacements, *NLRB*

Of course, the additional weapons in the employer arsenal are useful primarily in resisting a strike, and the fact remains that employers have no direct means of countering the union's ability to negotiate individual agreements. But upon analysis, we question whether this right of the union — at least as currently defined by the Board — constitutes as formidable a weapon, and creates as marked a disparity in bargaining power, as the courts suggest. Contrary to the implication in *Associated Shower Door*, 512 F.2d at 232, and *Hi-Way Billboards*, 500 F.2d at 183, the Board has not granted the unions unlimited withdrawal rights. Rather, the economic weapon at stake consists solely of the union's ability to negotiate "interim" agreements[16] — temporary settlements

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v. *Mackay Radio & Tel. Co.*, 304 U.S. 333, 345-46 (1938), and the nonstruck members can hire temporary replacements, *NLRB* v. *Brown*, 380 U.S. 278 (1965), thereby resuming normal operations. Moreover, even in the absence of a strike, all employers can use the lockout offensively to exert economic pressure on a union. *American Ship Building Co.* v. *NLRB*, 380 U.S. 300 (1964).

[16] To be distinguished are "separate" agreements, defined as final contracts entirely divorced from the multiemployer process. The Board has disapproved of a union's negotiation of separate contracts with group members, considering such conduct antithetical to and destructive of the multiemployer bargaining process. As a result, in most cases where one or more group members have reached separate agreements with the union, the Board has permitted the remaining members to withdraw. *See, e.g., Typographic Service Co.*, 238 NLRB No. 211, 1978-79 CCH NLRB ¶ 15,096, at 28,319 (1978); *Connell Typesetting Co.*, 212 NLRB 918, 921 (1974). The exception consists of situations where the union's conduct neither "proves an intention to destroy, [n]or necessarily causes the fragmentation of, a multiemployer unit." *Tobey Fine Papers*, 245 NLRB No. 181, 1979-80 CCH NLRB ¶ 16,330, at 30,539 (1979). Significantly, the Board has recently held that an employer's ability to negotiate a separate agreement is dependent on the consent of the multiemployer group. *Teamsters Local 378*, 243 NLRB No. 138, 1979-80 CCH NLRB ¶ 16,087 (1979). The employers can thus effectively prevent any of their members from defecting in the first place — an alternative that ensures the continued viability of the multiemployer group.

that will be superseded by any unit-wide contract ultimately negotiated.[17] There is little doubt that, through the selective use of this device in combination with a general strike, a union is capable of exerting some degree of uneven economic pressure — a whipsaw effect — on certain employers. But there is much to be said for the Board's position. As demonstrated by the lawfulness of such weapons as the selective

[17] In the Board's view, interim agreements neither fragment nor significantly weaken the multiemployer unit, and indeed do not represent withdrawals at all, since the signatories retain a vested interest in the outcome of group negotiations. Of course, even the Board has acknowledged that a party to such an agreement, having alleviated its immediate concerns and quite possibly enjoying a competitive surge relative to its struck counterparts, is less likely to push for a prompt settlement or otherwise share the group's bargaining strategies, *see Connell Typesetting Co.*, 212 NLRB at 921; in that sense, its strength at the negotiating table will have diminished. But by promising adherence to the ultimate unit-wide contract, a signatory cannot ignore entirely the ongoing negotiations. For this reason, we cannot subscribe to the Third Circuit's view that "allowing individual negotiations even on an interim basis is tantamount to a rejection of the existence of the multiemployer bargaining unit." *NLRB* v. *Beck Engraving Co., Inc.*, 522 F.2d at 483. Although interim agreements may not enhance the integrity of the bargaining unit, they seem unlikely to undermine it significantly.

Interim agreements are considered useful in facilitating the breaking of a stalemate and in providing a safety valve for employers particularly vulnerable to strike pressure. The Board has thus sanctioned the use of these arguments and has barred other employers from unilaterally withdrawing from the bargaining unit in response thereto. *See, e.g., Joseph J. Callier d/b/a Callier's Custom Kitchens*, 243 NLRB No. 143, 1979-80 CCH NLRB ¶ 16,104, at 30,135 (1979); *Sangamo Constr. Co.*, 188 NLRB 159, 160 (1971). The Board has also suggested, however, that an "unusual circumstance" permitting withdrawal might arise even here if interim agreements are negotiated on such a scale or on such terms as to evidence an intention on the union's part to fragment the bargaining unit. *See, e.g., Connell Typesetting Co.*, 212 NLRB at 921; Comment, 44 Fordham L. Rev. 1256, 1265 (1976).

strike, the uneven application of economic pressure *per se* is not inconsistent with multiemployer bargaining. In addition, the whipsaw effect resulting from a general strike coupled with one or more interim agreements corresponds closely to that arising from a selective strike followed by a partial employer lockout.[18] Because courts have seen no reason to fashion an additional weapon for employers in the latter instance, we question the necessity of doing so in the former.

But regardless of the propriety of the analytical approach adopted in *Hi-Way Billboards, Shower Door,* and *Steel Fabricators,* it is apparent that the three decisions hinged on the belief that the negotiation of individual agreements had unfairly tipped the balance of bargaining power, and not on any conviction that impasse alone justifies unilateral withdrawal.[19] This critical element is absent in the present case; as the Board stated, "no interim agreements were made or even attempted." Accordingly, these three decisions do not control our analysis.

By contrast, the *Beck* case is squarely on point. One member of a multiemployer unit there attempted to withdraw following the occurrence of an impasse and a selective strike. Notwithstanding that the union had made no attempt to negotiate individual agreements,[20] the court upheld the employer's withdrawal. It reasoned:

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[18] Those employers who sign interim agreements and resume operations are in an analogous position to those who refuse to join a lockout and thereby remain in operation. And significantly, just as the latter group could prevent any whipsaw by engaging in the lockout, the former group could do so by refusing to negotiate such agreements.

[19] *See* Murphy, *Impasse and the Duty to Bargain in Good Faith,* 39 U. Pitt. L. Rev. 1, 57 (1977); Comment, 44 Fordham L. Rev. 1256, 1264, 1266 (1976).

[20] One member had withdrawn earlier, but with the consent of both the group and the union. 522 F.2d at 478.

> The employer's right to withdraw during a bargaining impasse cannot be made contingent upon the union's prior exercise of its right to negotiate individual interim agreements. The rights of the parties should accrue simultaneously based upon the occurrence of an event which neither can manipulate (e.g., impasse). Were the rule otherwise, the party whose right accrues first would be given a tremendous bargaining advantage and leverage.

522 F.2d at 483. For several reasons, we find this rationale unpersuasive.

First, contrary to the court's premise, the Board has not in the past conditioned the ability of a union to negotiate interim agreements upon the existence of a bargaining impasse. The Board sanctioned the use of such agreements in *Sangamo Constr. Co.*, 188 NLRB 159 (1971), for example, notwithstanding the absence of any finding that an impasse had occurred. *Id.* at 160 ("bargaining did continue during the operative period").[21] Even if some right of withdrawal is necessary to counterbalance the union's ability to negotiate interim agreements, therefore, there is little reason to link it to the existence of an impasse.[22] Second, the court's charac-

[21] We express neither approval nor disapproval of the result reached in *Sangamo Constr. Co.*, 188 NLRB 159 (1971), as the matter is not now before us.

[22] Instead, the exercise of that right logically should be contingent upon the actual creation of such agreements. The *Beck* court's concern that, if the union's right "accrues first" it will gain "a tremendous bargaining power and leverage" over the employer group, seems misplaced. As noted above, interim agreements do not significantly impair the integrity of the bargaining unit. Moreover, unlike such weapons as a selective strike which can be deployed unilaterally, the union needs at least one consenting party to implement these agreements. Therefore, the union's ability to *threaten* to negotiate interim agreements should augment its bargaining power only minimally, if at all, especially if employers are able to withdraw upon any agreement actually being reached. And the Board could justifiably reject any measure that attempts to counteract such incremental leverage by sacrificing the stability of the multiemployer unit.

terization of an impasse as an event that neither party can "manipulate" appears unrealistic, or at least the Board could permissibly so conclude. It is true that a party's general adoption of a "take it or leave it" attitude would violate the statutory obligation to bargain in good faith. *See generally NLRB* v. *Insurance Agents' Int'l Union*, 361 U.S. at 483-87. But the Act expressly provides that the "obligation [to bargain collectively] does not compel either party to agree to a proposal or require the making of a concession." 29 U.S.C. § 158(d). We thus think it within the power of an employer or union in many cases to cause a stalemate, as by adhering to a position known to be unacceptable to the other side. To the extent this is possible, the *Beck* rule provides a party with a means of withdrawing whenever the impending agreement proves objectionable.[23] Third, because a precise formula for determining when a genuine impasse occurs has not been — and perhaps cannot be — formulated,[24] tying the right of withdrawal to this event can only lead to confusion concerning the rights of the parties. Finally, we feel that the *Beck* decision, and indeed the other cases as well, fail to accord suf-

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[23] *See* Note, 45 Brooklyn L. Rev. 1283, 1318 (1979); Comment, 17 B.C. Indus. & Com. L. Rev. 525, 539-40 & n.133 (1976).

[24] One widely accepted definition of impasse is "a state of facts in which the parties, despite the best of faith, are simply deadlocked." *NLRB* v. *Tex-Tan, Inc.*, 318 F.2d 472, 482 (5th Cir. 1963). The Board has fleshed out the term somewhat, indicating that whether an impasse has occurred depends on such factors as "[t]he bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, [and] the contemporaneous understanding of the parties as to the state of negotiations. *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), *enforced*, 395 F.2d 622 (D.C. Cir. 1968). Nonetheless, the decisional process remains at best an exercise of "judgment," *id.*, and a worst "a visceral reaction of the trial examiner and the Board to the record." Stewart & Engeman, *Impasse, Collective Bargaining and Action*, 39 U. Cin. L. Rev. 233, 241 (1970).

ficient weight to the policy of preserving the stability of multiemployer bargaining — a "vital factor" in promoting labor peace. *NLRB* v. *Truck Drivers Local 449*, 353 U.S. at 95. The Board could find that any rule permitting unilateral withdrawal upon impasse unnecessarily increases the opportunities for the dissolution of such bargaining units and thereby undermines an effective tool of labor relations.

Congress "intended to leave to the Board's specialized judgment the inevitable questions concerning multi-employer bargaining [which are] bound to arise . . . ." *Id.* at 96. As a result, the Board's "balancing of the conflicting legitimate interests [is] subject to limited judicial review." *Id.* (footnote omitted).[25] In the present case, we think the Board has struck a reasonable balance in concluding that impasse alone does not justify unilateral withdrawal.

IV.

Bonanno's remaining contention — that the Union consented to or otherwise acquiesced in its withdrawal — can be dismissed more summarily. In support thereof, Bonanno notes that the Union (1) did not explicitly object to its announced withdrawal on November 21, 1975, (2) continued to negotiate with the Association representatives, at one point inquiring as to who had replaced Bonanno on the committee, and (3) did not formally protest the attempted withdrawal until April 29, 1976, more than two weeks after a unit-wide agreement had been reached. These facts provide an insufficient basis to disturb the trial examiner's findings. A union is "under no duty to 'protest' [an employer's attempted withdrawal] in any formal manner . . . ." *NLRB* v. *John J.*

[25] A reviewing court's principal task is to ensure that the administrative decision is not "inconsistent with a statutory mandate [and does not] frustrate the congressional policy underlying a statute." *NLRB* v. *Brown*, 380 U.S. at 291.

Corbett Press, Inc., 401 F.2d 673, 675 (2d Cir. 1968). Here, the Union representative responded that he would have to consult with the Union attorney — certainly an indication more of opposition than of acquiescence. And although the Union's course of conduct can evidence implied consent, such conduct "usually must involve a course of affirmative action clearly antithetical to" the claim that no withdrawal has occurred. *I.C. Refrigeration Service*, 200 NLRB 687, 689 (1972). In the present case, that the Union made no attempt to negotiate individually with Bonanno, *see id.*, that a unit-wide agreement was not reached shortly after Bonanno's action, *compare, e.g., Fairmont Foods Co.* v. *NLRB*, 471 F.2d at 1173, and that the Union filed unfair labor practice charges on April 9, 1976 with respect thereto, all serve to negate any suggestion of Union acquiescence in Bonanno's untimely and — we rule — unlawful attempt to withdraw from the Association.

Enforcement granted.

CAMPBELL, *Circuit Judge* (Concurring). While I join in the ultimate conclusion of the court, namely, that "the Board has struck a reasonable balance in concluding that *impasse alone* does not justify unilateral withdrawal" (emphasis added), I emphasize that we are not here presented with the question whether, after the occurrence of both an impasse and the negotiation of interim agreements, an employer may unilaterally withdraw from a multi-employer group; accordingly, I would express no opinion on the resolution of the latter question, and do not join in the court's dicta on this interesting but nonessential matter.

Appendix B.

FJPMT

243 NLRB No. 140

D—4660
Medford, MA

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

CHARLES D. BONANNO LINEN SERVICE, INC.

and

Case 1—CA—11628

TEAMSTERS LOCAL UNION NO. 25, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

SUPPLEMENTAL DECISION AND ORDER

On May 12, 1977, the National Labor Relations Board issued its Decision and Order in the above-entitled proceeding,[1] finding that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to execute a collective-bargaining agreement reached between Teamsters Local No. 25 (the Union) and the New England Linen Supply Association (the Group).[2] In so finding, the Board adopted the Administrative Law Judge's Decision in which he found that the

[1] 229 NLRB 629 (1977).

[2] The Respondent is in the business of laundering and renting uniforms and linens. It has been a member of the Group which has negotiated with the Union for several years. Before the last contract expired in April 1975, negotiations were duly opened for a

Respondent's untimely withdrawal from the multiemployer Group was not justified. The Administrative Law Judge relied on *Hi-Way Billboards, Inc.*,[3] in holding that the existence of a bargaining impasse is not an "unusual circumstance" within the meaning of *Retail Associates, Inc.*[4] He specifically noted that four courts of appeal had rejected the Board's position that a bargaining impasse does not constitute such an unusual circumstance as to justify an employer's unilateral withdrawal from group bargaining. The Administrative Law Judge concluded, however, that he was bound by the *Hi-Way Billboards* rule of the Board.

In light of the holdings of the several courts of appeal[5] which have formulated an "impasse doctrine" enabling an

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new agreement and the Respondent authorized the Group to bargain in its behalf. The Respondent participated in the negotiations. Impasse was reached in May 1975 over whether the employees would be paid on a commission basis or remain on wages. Thereafter, in June 1975, the Union called a selective strike against the Respondent, and most of the Group responded by locking out their employees. After some 5 months during which the situation remained static, with all efforts to break the impasse failing, the Respondent withdrew from the Group. The remaining Group members then terminated the lockout and negotiations resumed with the Respondent absent. In April 1976, when the Union dropped its demand for compensation by commission, an agreement was reached. The Union thereafter informed the Respondent that it had not consented to the withdrawal and thus considered the Respondent bound by the terms of the agreement reached with the Group. The Respondent denied that it was bound and refused to execute the agreement.

[3] 206 NRLB 22 (1973).

[4] 120 NLRB 388 (1958).

[5] *N.L.R.B.* v. *Beck Engraving Co., Inc.*, 522 F.2d 475 (3d Cir. 1975); *N.L.R.B.* v. *Associated Shower Door Co., Inc., et al.*, 512 F.2d 230 (9th Cir. 1975); *N.L.R.B.* v. *Hi-Way Billboards, Inc.*, 500 F.2d 181 (5th Cir. 1974); and *Fairmont Foods Company* v. *N.L.R.B.*, 471 F.2d 1170 (8th Cir. 1972). Since the May 1977 Decision and Order in the instant case *the second circuit has joined its*

employer to withdraw unilaterally from a multiemployer bargaining unit, the Board, *sua sponte*, has decided to reconsider the instant case. For reasons to be set forth below we have concluded that this case was correctly decided and *we hereby affirm our conclusion that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to execute the contract reached between the Union and the Group which represented the Respondent.*

I

The basic rules governing withdrawal from multiemployer bargaining associations were set forth in *Retail Associates.* Absent mutual consent[6] or unusual circumstances, neither an employer nor a union may withdraw except upon unequivocal written notice prior to the date set by the contract for modification or the agreed-upon date to begin multiemployer negotiations. The Board has since held that these rules are to be applied equally to both employers and unions.[7] With respect to partial withdrawal, a union may, upon timely notice, consent to an individual employer's withdrawal and continue multiemployer bargaining unless the remaining employers exercise, in a timely fashion, their right to withdraw from the fragmented unit.[8]

"sister Circuits" in holding that an impasse will justify a party's unilateral withdrawal from multiemployer units. N.L.R.B. v. *Independent Association of Steel Fabricators, Inc.*, 582 F.2d 135 (2d Cir. 1978).

[6] While the Group's position on the Respondent's withdrawal is not at issue in this proceeding, an employer who wishes to perfect an untimely withdrawal must secure the consent of both the union and the multiemployer association of which it has been a member. See *Teamsters Union Local No. 378 (Olympia Automobile Dealers Association)*, 243 NLRB No. 138 (1979). Member Murphy was not a signatory to the *Olympia Automobile Dealers Association* decision and, in any event, does not find it applicable or relevant to the issue now before the Board.

[7] *The Evening News Association, etc.*, 154 NLRB 1494 (1965).

[8] *Pacific Coast Association of Pulp and Paper Manufacturers*, 163 NLRB 892 (1967).

For withdrawals after negotiations have begun, the Board has limited the "unusual circumstance" exception to cases in which "the very existence of an employer as a viable business entity has ceased or is about to cease"[9] *and to cases where consensual employer withdrawals through separate bargaining have so depleted a unit that it would be "unfair and harmful to the collective-bargaining process" not to permit one or more of the remaining employers to withdraw.*[10]

As to whether a bargaining impasse alone is sufficient to warrant withdrawal, our position, which we now reaffirm, is set forth in *Hi-Way Billboards, supra.* We there *held that there is nothing so extreme about impasse as to make it an unusual circumstance which is destructive of group bargaining. An impasse is only a temporary "deadlock" or "hiatus" in negotiations which in almost all cases is eventually broken, either through a change of mind or the application of economic force.* Indeed, an impasse may be brought about intentionally by one or both parties as a device to further, rather than destroy, the bargaining process. Suspension of the process as a result of an impasse may provide time for reflection and a cooling of tempers; it may be used to demonstrate the depth of a party's commitment to a position taken in the bargaining; or it may increase economic pressure on one or both sides, and thus increase the desire for agreement. For example, impasse permits the employer to place into effect those wage increases or benefits it has theretofore offered, an action (or the possibility of it) which may substantially shift the bargaining positions of the parties. In these and other possible uses of impasse as a bargaining tactic, the emphasis is toward achieving agreement rather than causing a permanent disruption of the relation. And much the same

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[9] *Hi-Way Billboards, Inc., supra* at 23.

[10] *Connell Typesetting Company, et al.,* 212 NLRB 918, 921 (1974).

may be true even of impasses which arrive without being intended by either side. Consequently, there is little warrant for regarding an impasse as a rupture of the bargaining relation which leaves the parties free to go their own ways. For these reasons, we *held that it would not effectuate the policies of the Act to permit an employer to withdraw from a multiemployer unit solely because a bargaining impasse has been reached.*

The courts of appeal that have rejected this position have not, in our view, focused exclusively on the impact of impasse on the collective-bargaining process. We suggest that the courts have seized on the impasse concept as a means of addressing two other important problems that can arise in the multiemployer context; namely, unit fragmentation and imbalances in relative bargaining strength.[11] After reviewing the court decisions in question, we shall synthesize our views on union and employer obligations at impasse. We shall treat, in particular, the impact of interim agreements following impasse on multiemployer bargaining dynamics.

II

In *Fairmont Foods Company, supra,* the court excused an employer's withdrawal from a multiemployer bargaining unit after negotiations had begun but before an agreement had been reached.[12] Additionally, the court found evidence of union consent to Fairmont's withdrawal in the fact that the union was willing to negotiate during impasse with other association members. It was "particularly incongruous," the

[11] For a scholarly recognition and discussion of this point, see Murphy, "Impasse and the Duty To Bargain in Good Faith," 39 U. of Pittsburgh L. Rev. 1, at pp. 50-60 (1977).

[12] The court relied on *Morand Brothers Beverage Co., et al.,* 91 NLRB 409 (1950), enfd. 190 F.2d 576 (7th Cir. 1951). The Board's holding in this case predated *Retail Associates, supra,* and is no longer valid.

court suggested, that the Board had not found acquiescence in the withdrawal in light of interim agreements, intended to be merged later into the associationwide agreement, between the union and three other employers.

The Fifth Circuit, in *Hi-Way Billboards, Inc., supra,* accepted the Board's reasoning on the impact of impasse only insofar as our decision protected the interests of the union and of the employees in the multiemployer unit. The court expressed doubts, however, as to the "fairness" of the Board's policy of not permitting unilateral employer withdrawal at impasse. The court relied on *Pacific Coast Associates, supra,* in finding Board support for a union's withdrawing with respect to some employers while it continues a multiemployer relationship with a now depleted association.[13] The Fifth Circuit disapproved, on equitable grounds, of the Board-sanctioned opportunity, taken in *Hi-Way Billboards, Inc.,* for a union to reach interim agreements with some employers and then to whipsaw those employers remaining in the association.

The third court to consider withdrawal rights at impasse was the Ninth Circuit in *Associated Shower Door Co., Inc., supra.*[14] The court, following the Fifth and Eighth Circuits, relied on *Pacific Coast* and *The Evening News Association,*

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[13] With all due respect, we note that the court misread *Pacific Coast.* As indicated, *supra,* we allowed union withdrawal in that case because timely notice was given prior to the start of negotiations. *Pacific Coast* would not in any case lead to whipsawing, since we also held that individual employers are also free to withdraw prior to negotiations.

[14] After impasse, the union signed interim agreements with several members of the association after those members had sought out the union, requesting separate settlements based on the union's last offer. The union agreed and included "most favored nation" clauses in the separate agreements. When the association finally settled with the union it got less favorable terms than the employer-members who had signed the separate agreements.

supra, as to equality of withdrawal rights, and reasoned that (at 512 F.2d at 232):

> [I]t seems only fair that, when an impasse is reached and a union then engages in selective picketing and enters into substantial individual agreements with employers who had been members of the multiemployer unit, the withdrawal of the remaining members of the unit, if unequivocally communicated, should be permitted.

Otherwise, the court stated the union could sign individual agreements with some employers and then subject the remaining members of the "significantly fragmented and weakened multiemployer unit" to whipsawing. The court thus designed a fairness rationale which viewed the Board as having violated its own policy of preserving the equality of withdrawal rights in multiemployer situations.

In *Beck Engraving Co., supra,* the Third Circuit found that an impasse reached in multiemployer bargaining constituted an unusual circumstance under *Retail Associates* and thus justified the respondent's unilateral withdrawal.[15] The court's analysis did not directly confront the Board's *Hi-Way Billboards* rationale. The Third Circuit agreed with the *Shower Door* decision that the Board has, in its post-*Retail Associates* decisions, deviated from its policy of applying its rules in an even-handed manner. Since the Board has approved a union's negotiation of interim agreements with in-

[15] When a bargaining impasse was reached during negotiations for a new contract, the union began a selective strike. Then the union, the association, and an individual employer agreed to that employer's withdrawal from the unit. Thereafter, more employers were struck. The respondent's employees withdrew from the union and returned to work and the respondent then announced its withdrawal from the association. Shortly thereafter the union and the association reached agreement on a new contract which the respondent then refused to sign.

dividual members of a multiemployer group,[16] we have, according to the court, effectively given permission to unions to whipsaw those employers who do not sign such agreements.

The *Beck* court stated that allowing interim agreements strengthens a union's hand *vis-a-vis* the employers who continue to bargain within the unit. This it found tantamount to a rejection of the existence of the multiemployer unit since it is inconsistent to say that the union and some employers may act on an individual basis while other employers in the same unit, relegated to this position by the union's refusal to negotiate with them on an individual basis, must adhere to group bargaining. The court concludes that the Board's approval of individual interim agreements during multiemployer bargaining and without requiring withdrawal from the multiemployer unit is sufficient cause for according the remaining employers an equivalent right—unilateral withdrawal after impasse.[17]

The court rejected the Board's contention that since the union did not attempt to negotiate interim agreements the above rationale would not apply. It held that the employer's

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[16] *Plumbers and Steamfitters Union No. 323 (P.H.C. Mechanical Contractors),* 191 NLRB 592 (1971), and *Sangamo Construction Company,* 188 NLRB 159 (1971).

[17] The court employed a balancing test with respect to what it termed "economic weapons," taking its cue from *N.L.R.B.* v. *Truck Drivers Local Union No. 449, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A.F.L. [Buffalo Linen Supply Co.],* 353 U.S. 87 (1957). There the Supreme Court held that nonstruck members of a multiemployer bargaining unit could utilize a general lockout as a defense to a selective strike. Since the Third Circuit asserts that in *P.H.C. Mechanical Contractors* and *Sangamo, supra,* the Board has sanctioned a "second" weapon for a union in addition to the selective strike, this resulting new imbalance requires the grant of a corresponding "second" weapon for each employer in a multiemployer unit.

right to withdraw unilaterally cannot be made contingent on the union's exercise of its concomitant right. The court held that, if they are equal rights, they should accrue simultaneously based upon the occurrence of an event which neither party can manipulate, i.e., impasse. Otherwise stated, the court, the party whose right accrues first would have a "tremendous bargaining advantage and leverage."

After acknowledging that its ruling would add to the instability of group bargaining, contrary to what the *Retail Associates* rules sought to accomplish, the court nevertheless found that the interest in preserving the balance of power in multiemployer bargaining outweighs the loss of stability. The court went on to suggest that if the Board were to "return" to the *Retail Associates* rules by disapproving of individual interim agreements the courts might well respond by disallowing unilateral withdrawal by employers after impasse.[18]

III

The foregoing summary reveals, in our view, a history of judicial reluctance to deal directly with the Board's approach to the impact of a bargaining impasse on multiemployer negotiations. Our concern has been with the dynamics of impasse, the potentialities for renewed unitwide bargaining, and thus with the stability of multiemployer units. The courts have focused on the Board's approval of individual interim agreements or substantial arguments having been entered into, and viewed the result as contrary to the principle of even-handed application of Board rules for withdrawal from multiemployer units. Further, the Board's "departure," in the words of the *Beck* court, from *Retail Associates* and its progeny has disturbed a balance of economic weapons between a union and the employer-members of a multiemployer unit. The courts have responded by creating an equitable im-

[18] *N.L.R.B.* v. *Beck Engraving Co.*, 522 F.2d at 484.

passe doctrine designed to redress the asserted imbalance by finding that impasse or impasse plus interim agreements or "substantial" agreements as in *Associated Shower Door* constitutes an unusual circumstance sufficient to justify unilateral withdrawal by an employer.

We respectfully disagree with the Third Circuit's characterization of a bargaining impasse as an occurrence which neither party can manipulate. We reaffirm our belief that "[i]n the overall ongoing process of collective bargaining, [impasse] is merely a point at which the parties cease to negotiate and often resort to forms of economic persuasion to establish the primacy of their negotiating position."[19] The Board is of the view, for the reasons set forth below, that we fulfill our statutory obligation to promote effective collective bargaining by permitting a union to negotiate, after impasse, true interim agreements with individual members of a multiemployer unit without thereby creating new withdrawal rights in the remaining employers.

Since all the courts have stressed the importance of postimpasse agreements between the union and individual employer-members of a multiemployer unit, it is vital to understand what kinds of agreements the Board has approved. In *Sangamo, supra,* the interim agreement continued the recently expired contract until a new associationwide contract was negotiated, at which time the employer was to adopt its terms and conditions and grant any wage increases retroactively. The Board, in dismissing charges that the employer and the union, respectively, violated Sections 8(a)(5) and 8(b)(3), held that the interim agreement had no significantly adverse impact on the integrity of the multiemployer unit. The agreement did not derogate the unit's bargaining authority nor did it place the early signer outside the coverage of the

[19] *Hi-Way Billboards, Inc.,* 206 NLRB at 23.

ultimate associationwide contract. In *P.H.C. Mechanical Contractors, supra,* the interim agreement contained the same terms that had been offered to and rejected by the association. As in *Sangamo,* the early signer was bound to become a party to the eventual unit contract. Thus, in both cases, since the early signers maintained a vested interest in the outcome of final union-association negotiations, the multiemployer unit was neither fragmented nor significantly weakened.

We distinguish, in the multiemployer bargaining context, between interim agreements which contemplate adherence to a final unitwide contract and are thus not antithetical to group bargaining and individual agreements which are clearly inconsistent with, and destructive of, group bargaining.

An example of the latter type of agreement is found in *Typographic Service Co.*[20] A panel majority, Chairman Fanning dissenting on the facts, there held that employer-members of a multiemployer bargaining unit did not violate Section 8(a)(5) by unilaterally withdrawing after impasse and the negotiation of separate contracts with several other employer-members.[21] The Board found that the union's conduct "effectively fragmented and destroyed the integrity of the bargaining unit" and thus fell within the "unusual cir-

[20] 238 NLRB No. 211 (1978).

[21] After a bargaining impasse, all employer-members placed into effect their last proposal. The following day the union struck 17 employers. The union then offered to end the strike against any employer who would reinstate the terms of the expired contract which provided for continuation of its terms until new terms were agreed upon. Seven employers accepted this offer. The union then offered one of these employers a choice between executing a contract based on an eventual associationwide contract or an agreement based on union contracts with employers, not members, of the unit. A second employer-member received a union offer to sign one of two contract proposals, both of which differed from the association's proposals. At this point the 10 employer-members who did not sign the interim agreements announced their withdrawal.

cumstances" exception of *Retail Associates*. The union offered to conclude its "interim" agreements with final agreements which differed not only from each other but also from proposals made during the preimpasse bargaining stage. Further, acceptance of the final offers made to individual employer-members would have rendered impossible a final agreement binding on all unit members.[22]

An interim agreement is thus appropriate to the extent it facilitates the breaking of impasse and the resumption of unitwide collective bargaining with all employers maintaining an equivalent stake in the final outcome. As in *Sangamo* and *P.H.C. Mechanical Contractors*, and unlike *Typographic Service Co.*, such an agreement is one which establishes terms and conditions of employment for one or more employer-members pending the outcome of renewed group bargaining. Any resulting group agreement would then apply to all employers, including each signer of an interim agreement. Acceptance of this commitment will preclude a finding that the early signers had withdrawn from the unit. We disagree with the courts who have viewed such temporary economic pressure on remaining group members as inconsistent with the concept of multiemployer bargaining units or with the Board's rules based on *Retail Associates* and its progeny.

With all due respect to the Third Circuit we disagree with its analysis of what factors are to be balanced in the multiemployer bargaining context and its conclusion as to how that balance is to be struck. Beginning with the Supreme Court's admonition that the Act does not constitute the Board as an "arbiter of the sort of economic weapons the parties can use

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[22] Chairman Fanning notes that neither of these separate contracts was entered into. The "negotiation" his colleagues refer to could accurately be characterized as an exploratory tactic calculated to get the parties back to multiemployer bargaining, in effect an appropriate "dynamic" of impasse.

in seeking to gain acceptance of their bargaining demands,"[23] we reemphasize that, absent proof of unlawful motivation, parties have great leeway in exerting concurrent economic pressure on each other. As summarized in our *Hi-Way Billboards* decision, following a genuine impasse the union can call for a strike; the employer can engage in a lockout, make unilateral changes in working conditions if they are consistent with the offers the union has rejected, or hire replacements to counter the loss of striking employees.[24] The *Beck* court, choosing to focus on only some of these options, granted withdrawal rights to employers in response to what it perceived as a two-to-one "weapons" imbalance in favor of the Union.[25]

However, the Board's statutory mandate is to balance, not economic weapons, but "conflicting legitimate interests."[26] We view the exercise of this responsibility as a complex un-

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[23] *N.L.R.B.* v. *Insurance Agents' International Union, AFL-CIO [Prudential Insurance Co.]*, 361 U.S. 477, 497 (1960):

> [T]he use of economic pressure by the parties to a labor dispute is not a grudging exception to some policy of completely academic discussion enjoined by the Act; it is part and parcel of the process of collective bargaining.

[24] See *Hi-Way Billboards, Inc., supra* at 23.

[25] In examining the options available to employees, the *Beck* court, and the others noted herein, were unable to consider the Board's recent decision in *Olympia Automobile Dealers Association, supra,* where the Board recognized that, even in the absence of a finding of fragmentation, a multiemployer association has the right to object to the negotiation of a separate, final agreement between the union and an employer-member and can prevent the defection of one of its members by filing a refusal-to-bargain charge with the Board. This approach, rather than allowing the remaining employers to withdraw from the association and thereby destroy group bargaining, stabilizes group bargaining by allowing the association members to insist that parties remain in the unit in accordance with their original commitment. See also fn. 6, *supra.*

[26] *Buffalo Linen Supply Co., supra* at 96.

dertaking not readily, if at all, amenable to simple arithmetic calculations.

We have considered carefully the implications for multiemployer bargaining of interim agreements negotiated during impasse and conclude that such agreements may prevent significant unit fragmentation rather than cause it and do tend to facilitate the breaking of impasse. Interim agreements of the type deemed appropriate under our standards discussed *supra* are calculated to further, not destroy, unit integrity inasmuch as they preserve a continuing mutual interest by all employer-members in a final associationwide contract.[27] The provisions of the Act itself, rather than relative bargaining strengths, are the determinative factors in assessing the legality of particular forms of economic pressure.

In the instant case no interim agreements were made or even attempted. Considering the facts as described above in footnote 2, including the achievement of the multiemployer bargaining objective to continue the method of driver-pay on wage basis, and the supportive action that the lockout afforded the Respondent during the strike against it, we see no reason to allow the Respondent to withdraw from the multiemployer unit in untimely fashion. In the circumstances it is appropriate that the Respondent execute the contract ultimately achieved by the other unit members. Accordingly, we hereby affirm the original panel decision finding that the Respondent violated Section 8(a)(5) of the Act.

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[27] This is our response to contentions that a union's negotiation of an interim agreement is either "tantamount" to rejection of the existence of a multiemployer unit, or a consent to withdrawal.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby affirms as its Order the Order heretofore entered in this proceeding on May 12, 1977 (229 NLRB 629).

Dated, Washington, D.C. August 6, 1979

John H. Fanning, Chairman

Howard Jenkins, Jr., Member

John A. Pennello, Member

Betty Southard Murphy, Member

John C. Truesdale, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

Appendix C.

JD-833-76
Medford, MA

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

DIVISION OF JUDGES

CHARLES D. BONANNO LINEN SERVICE, INC.

and Case No. 1-CA-11,628

TEAMSTERS LOCAL UNION NO. 25, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

Francis X. McDonough, Esq.,
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General Counsel.
Sidney A. Coven, Esq.
(*Lepie & Coven*), Boston,
MA, for the Respondent.
Alan J. McDonald, Esq.
(*Grady & McDonald*), Boston,
MA, of the Charging Party.

DECISION

Statement of the Case

JAMES M. FITZPATRICK, Administrative Law Judge: The main question in this case is whether one employer, of a

group negotiating with a union, may, by leaving the group during a bargaining impasse, avoid obligations under the contract later agreed on between the Union and the remainder of the group. As set out hereinafter I find the withdrawing employer is bound by the contract because circumstances were not so unusual as to justify withdrawal where the Union has not consented.

The case arises from unfair labor practice charges filed April 9, 1976 by Teamsters Local Union No. 25, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union). A complaint based on the charges issued May 20, 1976 alleging that Charles D. Bonanno Linen Service, Inc. (Bonanno) engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act by refusing to execute a collective bargainng agreement negotiated between the Union and a group of employers after Bonanno purported to withdraw from the group. Bonanno answered, admitting jurisdictional allegations, the authority of the group to bargain on behalf of member employers, including Bonanno, and the attempt of Bonanno to revoke that authority. Bonanno denied the balance of the allegations, including legal conclusions that it engaged in unfair labor practices. The case was tried before me at Boston, Massachusetts on August 30, 1976.

Based on the entire record, including my observation of the witnesses, and consideration of excellent briefs from the parties, I make the following:

Findings of Fact

I. The Employers Involved

Bonanno is a Massachusetts corporation engaged at Medford, Massachusetts in the laundering, rental and distribution of linen, uniforms, and related products. In the operation of

its business it annually receives at its Medford plant from points outside Massachusetts chemicals, linens and other fabrics valued over $50,000. Its annual gross receipts exceed $500,000. The complaint alleges, the answer admits, and I find, that Bonanno is an employer engaged in commerce within the meaning of the Act.

The New England Linen Supply Association (the Group) is comprised of 10 employers, including Bonanno, engaged in the linen service business.[1]

II. The Labor Relations

A. *Background*

The Union is a labor organization within the meaning of Section 2(5) of the Act. It represents the truckdrivers and helpers employed by Group members. The parties stipulate that the employees so represented constitute an appropriate bargaining unit.

For some years past the 10 employers referred to above have negotiated as a group with the Union respecting the terms of employment of their drivers and helpers. On September 21, 1972 they signed individual and identical agreements with the Union which were to remain in effect until April 18, 1975 and thereafter until amended by mutual agreement or terminated in accordance with a provision that "either party desiring to amend or terminate the contract shall on or after February 15, 1975 notify the other party in writing of said intention."

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[1] The other nine are Bristol Coat & Apron Service Co., Loyal Crown Linen Service, Inc., Delaney Linen Service, Inc., Federal National Linen Service Co., Independent Leasing Corporation, Gilman Towel Supply Co., Inc., Morgan Services, Inc., Norfolk County Linen Service and Standard Linen Service.

B. *Negotiations for a Current Contract*

On about February 19, 1975 Bonanno authorized the Group to bargain collectively on its behalf with the Union, and subsequently, such bargaining took place. On March 14, 1975, apparently in anticipation of possible termination of the existing agreements but without formal notification thereof, the Union and the Group met for their first negotiating session looking toward a new agreement. Thereafter they held further negotiating meetings on March 19 and 26, April 1, 3, 11, 13, 14, 16, 17 and 30. In the meantime, on April 18 the Union by letter notified each member of the Group that it was giving 60-day notice of termination pursuant to the terms of the 1972 agreements. On April 23, 1975 the attorney representing the Group by letter offered to meet with the Union for the purpose of negotiating a new agreement.

On April 30, 1975 the negotiators reached agreement, subject to ratification by the employees, which provided for compensation to employees on an hourly basis. On May 4, 1975 the employees voted to reject the contract.

The negotiators next met on May 12 at which time the Union proposed that employees be compensated on a commission basis rather than at an hourly rate. Group negotiators rejected this proposal, adhering to the position previously taken. The negotiators again met on May 15 and the Union again insisted on pay on a commission basis. Management negotiators again rejected the proposal, advising the Union that they would accept a strike rather than concede on the issue. At a further session on May 20 the positions of the parties remained unchanged. It is undisputed that an impasse on this issue had been reached on May 15. A further meeting on June 18 was unsuccessful in breaking the impasse.

C. *The Strike and Lockout*

On June 23, 1975, the impasse continuing, the Union called a selective strike against Bonanno in which all of its drivers participated. At the time of the hearing that strike was still in effect. The fact that the Union struck only Bonanno is not a circumstance which justified Bonanno's later withdrawal from the Group. Selective strikes are a legitimate tactic for exerting economic pressure. Their occurrence does not relieve a struck employer of his obligation to bargain with the Union. See *Beck Engraving Co.*, 213 NLRB 53, 54-55 (1974), enf. den. 522 F. 2d 475 (C.A. 3, 1975); *State Electric Service, Inc.*, 198 NLRB 592, 593 (1972); *Hi-Way Billboards, Inc.*, 206 NLRB 22, 23 (1973), supplementing 191 NLRB 244, enf. den. 500 F. 2d 181 (C.A. 5, 1974).

After the strike began, most of the other employers in the Group locked out their drivers, thus presenting a united front to the Union. The parties continued to meet, however, in an effort to reach an agreement. Negotiating sessions were held on July 22, August 15 and September 2, 1975. But impasse continued on the issue of method of payment to drivers.

The Union argues that because some employers during strategy sessions urged that a sky-high wage offer be made in an effort to break the impasse, a tactic which Bonanno opposed, a potential break in the impasse was apparent and therefore continuation of the impasse should not be viewed as a legitimate reason for Bonanno withdrawing from group bargaining. There is no merit to this contention. Remarks made during strategy sessions could have only the most speculative impact on the actual bargaining situation.

Of greater significance is the fact that before Bonanno withdrew two other employers in the Group secretly had been in direct touch with the Union, presumably in an effort to make a separate settlement.[2] Nothing came of these secret

[2] Nothing in the record suggests that it was the Union that made the secret overtures. In any case, the Union did not make any agreement with the wayward employers.

contacts. Whether they reached the level of negotiations does not appear. In the circumstances I find the Group was not thereby fractured in a manner warranting withdrawal by others in the Group. See *Ice Cream, etc., Workers Union Local 717 (Ice Cream Council),* 145 NLRB 865, 870 (1964).

D. *The Respondent's Withdrawal from the Group*

On November 21, 1975, the strike and lockout still being in effect and the impasse continuing, Bonanno revoked its prior authorization to the Group to bargain on its behalf, stating, "The Company is withdrawing from the Association with specific respect to negotiations at this time because of an ongoing impasse with Teamsters Local 25." Bonanno indicated it would engage in bargaining directly with the Union. A copy of its revocation letter was mailed to the Union on November 21 and that same day read to a union representative over the telephone.

Between commencement of the strike on June 23 and the notice of withdrawal on November 21 Bonanno hired permanent replacements for all of its striking drivers. Thus, from its point of view there was less reason than earlier to continue with group bargaining. But the difference in personnel was not such a circumstance as would justify withdrawal from the Group because the hiring of replacements was a logical outgrowth of the strike and a normal management effort to survive. *N.L.R.B.* v. *MacKay Radio & Tel. Co.,* 304 U.S. 333 (1938). Use of such normal measures are not "unusual circumstances" which justify withdrawal from group bargaining.

Bonanno strongly urges that the ongoing impasse was an unusual circumstance justifying its withdrawal from the Group in accordance with the Board's decision in *Retail Associates, Inc.,* 120 NLRB 388, 393-395. It especially relies

on four Court of Appeal decisions so holding. See *N.L.R.B.* v. *Beck Engraving, Co.*, 522 F. 2d 475 (C.A. 3, 1975); *N.L.R.B.* v. *Associated Shower Door Co., Inc.*, 512 F. 2d 230 (C.A. 9, 1975); *N.L.R.B.* v. *Hi-Way Billboards, Inc.*, 500 F. 2d 181 (C.A. 5, 1974); and *Fairmont Foods Co.* v. N.L.R.B., 471 F. 2d 1170 (C.A. 8, 1972). See also the dictum of the First Circuit in *N.L.R.B.* v. *Field and Sons, Inc.*, 462 F. 2d 748 (1972).

The General Counsel and the Union point out that the Board has not followed the line taken by the Courts of Appeal. Under Board law a bargaining impasse does not constitute such an unusual circumstance as to justify an employer's unilateral withdrawal from group bargaining. See *Hi-Way Billboards, Inc.*, 206 NLRB 22 on remand from *N.L.R.B.* v. *Hi-Way Billboards, Inc., supra;* and *Goodsell & Vocke, Inc.*, 223 NLRB No. 12 (slip op. p. 13). The position taken by the Board is, of course binding on me. *Insurance Agents' International Union,* 119 NLRB 768, 773. Accordingly, I find the circumstance of an ongoing impasse to be an insufficient reason for Bonanno to have withdrawn from the Group. Accordingly, unless the Union went along with the withdrawal (a subject discussed later herein) Bonanno had a continuing duty to participate in group bargaining, a duty which it violated by withdrawing.

E. *The Continuing Negotiations*

Shortly after the withdrawal a Group representative informed the Union by letter dated November 24, 1975 that he understood the Union had been notified that Bonanno had withdrawn. The letter stated that the remainder of the Group would continue to negotiate with the Union and announced that the lockout by the remaining members was being terminated.

Thereafter the Group without Bonanno met with the Union and negotiated further on December 1, 1975, February 4, April 5 and April 13, 1976.[3]

On April 13, 1976 the Union dropped its demand for compensation by commission and accepted a management offer of a revised hourly wage rate. With this development, agreement was finally reached on a new contract.

F. *The Union's Claim on Bonanno*

Although the Union had not communicated with Bonanno since its withdrawal, other than to file unfair labor practice charges on April 9, after it reached agreement with the Group on April 13, it claimed that Bonanno also was bound by the terms of the contract bargained. By letter of April 29, 1976, the Union informed Bonanno that the Union at no time had consented to its withdrawal, that it considered Bonanno to be a member of the Group and bound by the settlement reached. On May 3, 1976 Bonanno's attorney replied to the Union by letter denying it was bound by the agreement reached.

G. *Union, Consent, Acquiescence and Estoppel*

Bonanno contends that even if its withdrawal was untimely and unjustified by unusual circumstances, the Union has gone along with the withdrawal by consenting or acquiescing to it, and in any case should not now be heard to object to it.

1. Consent or acquiescence

As to consent, it is clear the Union did not specifically consent at the time of withdrawal. When Charles Bonanno read the withdrawal letter to union field representative Herbert

[3] On April 9 the Union filed the instant unfair labor practice charges against Bonanno.

Salter over the telephone on November 21, 1975, Salter made no comment other than to indicate he would wait to see a copy of the letter before confirming the telephone call and he would probably consult the Union's attorney. This could not reasonably be understood as consent to what Bonanno was doing but only as acknowledgement of notice that he was doing it.

Up to that point Charles Bonanno had been a member of the employer bargaining committee. At the first negotiating meeting following withdrawal Union President William McCarthy inquired as to who had replaced Charles Bonanno on the employer bargaining committee. He thus recognized that Bonanno was in fact not actively participating in the continuing negotiations. But it was not more than that. It did not amount to an agreement with Bonanno's legal position that it could withdraw anymore than continuing negotiations with the balance of the Group amounted to consent to Bonanno's absence. To hold otherwise would give every dissident in group bargaining the power to ruin collective bargaining for all others involved. By negotiating with the balance of the Group and recognizing that Charles Bonanno was no longer on the bargaining committee, the Union only acknowledged the *de facto* situation.

No futher reference to Bonanno's absence occurred until the final session on April 13. At that meeting, after agreement was reached on contract terms, an attorney for the Group asked, "What about pending litigation?" He was referring to collateral litigation including an antitrust suit by the Union against the Group, an injunction suit by the Group against the Union, and unemployment compensation cases. He apparently did not intend to include the instant unfair labor practice charges which Bonanno had filed April 9 because the Group attorneys were unaware of them. Herbert Salter, speaking for the Union, responded that, "... we

would probably wash all the pending litigation—this does not include Bonanno, they are separate now and not in the group." At that time Bonanno was not represented in the pending litigation by the attorneys for the Group, but was separately represented by the attorneys who later appeared for it in the Board proceeding.

Salter's response acknowledged the long established *de facto* separation of Bonanno from the Group. But he could not have meant to release Bonanno from its duty to bargain with the group. Section 8(a)(1), and (5) unfair labor practice charges based on Bonanno's refusal to bargain with the Group had been filed only 4 days earlier and are still pending in this proceeding. They stand as a constant union assertion that Bonanno is bound to Group bargaining. Respecting the other pending litigation, Salter's response is ambiguous when applied to Bonanno.[4] Such ambiguity should be construed in a manner consistent with the Union's position in the pending unfair labor practice charges. On April 29 the Union sent Bonanno a letter denying it had ever consented to its withdrawal and asserting it was bound to the negotiated contract.

Considering the above circumstances I find that the Union did not, directly or by implication, consent to, nor acquiesce in, Bonanno's withdrawal from Group bargaining. See *Fairmont Foods Company,* 196 NLRB 849; *John J. Corbett Press, Inc.,* 163 NLRB 154, 158 fn. 14; *The Carvel Company, et al.,* 226 NLRB No. 18, fn. 8 (slip op., p. 6), 93 LRRM 1157, 1160.

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[4] It is not clear how the Union could wash out its antitrust suit against all except Bonanno, nor why it would want to leave Bonanno as the only surviving plaintiff in an injunction suit against the Union.

2. Estoppel

Bonanno also contends that the Union (and the General Counsel) should not now be heard to object to the withdrawal because (a) for months following the withdrawal the Union remained silent and did not affirmatively object (b) the Union continued bargaining with the balance of the Group, and (c) following the withdrawal the Union accepted the beneficial consequences of the withdrawal, namely, termination of the lockout by other employers in the Group. The Board has already rejected these contentions in *Fairmont Foods Company, supra.*

In sum, I find that Bonanno was obliged to bargain with the Group, that its attempt to withdraw while negotiations were in progress was not timely nor justified by the circumstances, including the ongoing impasse and the selective strike, and since the withdrawal the Union has neither consented to nor acquiesced in the withdrawal nor should it be estopped now from claiming that Bonanno is bound to the agreement reached with the Group. Bonanno's refusal to honor that agreement is, and has been, a breach of its duty to bargain in good faith and is an unfair labor practice within the meaning of Section 8(a)(5) and (1) of the Act.

III. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Bonanno set forth in section II, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

Conclusions of Law

1. Bonanno is an employer within the meaning of Section 2(2) and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is, and has been at all material times, the exclusive bargaining representative of the employees of Bonanno in the following appropriate unit:

> All linen supply truck drivers and helpers employed by members of the New England Linen Supply Association, exclusive of all other employees, office clerical employees, guards and all supervisors as defined in Section 2(11) of the Act.

4. By its refusal to adopt the agreement reached between the Union and the Group bargaining on behalf of members of the New England Linen Supply Association, and by its refusal to give effect to the terms and conditions contained therein, Bonanno engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Bonanno has engaged in certain unfair labor practices, I recommend it cease and desist therefrom and take certain affirmative action that I find necessary to effectuate the policies of the Act. In this connection Bonanno should immediately sign and implement the agreement reached between the Union and the Group, and, as urged by the General Counsel in his brief, apply it retroactively to April 13, 1976, making its employees whole for any loss of

earnings suffered since then as a result of its failure to apply the agreement. See the *Carvel Company, et al.*, 226 NLRB No. 18. Backpay is to be computed in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon at 6 percent calculated according to the formula set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). Nothing herein is to be construed as requiring Bonanno to recoup wages or benefits already received by its employees. Bonanno should also preserve and make available to Board agents, upon request, all pertinent records and data necessary in analyzing and determining whatever backpay may be due. It should also post appropriate notices at its Medford, Massachusetts facilities.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[5]

ORDER

Respondent Bonanno, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Teamsters Local Union No. 25, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive bargaining representative of its employees in the appropriate unit described herein.

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[5] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(b) Refusing to sign and to implement the 1976-79 linen supply agreement reached between the above Union and the Group representing employer members of the New England Linen Supply Association with respect to its employees in the appropriate unit described herein.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under the National Labor Relations Act, as amended.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Forthwith sign and implement the above-described agreement and give retroactive effect thereto from April 13, 1976.

(b) Make whole its employees in the above-described bargaining unit for any loss of pay or other employment benefits they may have suffered by reason of its refusal to sign and implement the aforesaid agreement, in the manner set forth in the section entitled "The Remedy".

(c) Preserve and, upon request, make available to the Board or its agents for examination and copying all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its place of business in Medford, Massachusetts, copies of the attached notice marked "Appendix".[6] Copies of said notice, on forms provided by the Regional Director for Region 1, after being duly signed by

---

[6] In the event the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Respondent Bonanno's representative, shall be posted by it immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by it to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 1, in writing, within 20 days from the date hereof, what steps it has taken to comply herewith.

Dated, Washington, D. C., Dec. 20, 1976.

/s/ James M. Fitzpatrick
Administrative Law Judge

APPENDIX

FORM NLRB-4727 (9-69) JD-833-76

[SEAL] **NOTICE TO EMPLOYEES** [SEAL]

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT refuse to bargain with TEAMSTERS LOCAL UNION NO. 25, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, by refusing to sign and implement the 1976-79 contract between the Union and member employers of the New England Linen Supply Association.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights under the National Labor Relations Act, as amended.

WE WILL forthwith sign and implement the above-mentioned contract and give retroactive effect thereto, from April 13, 1976.

WE WILL make whole our employees in the bargaining unit for any loss of pay or other employment benefits they may

have suffered by reason of our refusal to sign and to implement the aforesaid collective bargaining agreement.

CHARLES D. BONANNO LINEN SERVICE, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 12th Floor - Keystone Building, 99 High Street, Boston, Mass. 02110. Telephone (617) 223-3348.

229 NLRB No. 108

FJM
D–2197
Medford, Mass.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

CHARLES D. BONANNO LINEN SERVICE, INC.

and Case 1–CA–11628

TEAMSTERS LOCAL UNION NO. 25, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

DECISION AND ORDER

On December 20, 1976, Administrative Law Judge James M. Fitzpatrick issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, the Charging Party filed cross-exceptions and a supporting brief and also a brief in opposition to the Respondent's exceptions, and the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to

affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Charles D. Bonanno Linen Service, Inc., Medford, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order.

Dated, Washington, D.C. May 12, 1977

John H. Fanning, Chairman

Howard Jenkins, Jr., Member

Betty Southard Murphy, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

Office Supreme Court, U.S.
FILED
MAY 29 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-931

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1980.

CHARLES D. BONANNO LINEN SERVICE, INC.,
PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD
AND
TEAMSTERS LOCAL UNION NO. 25, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Joint Appendix.

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Counsel for Respondent Union.

PETITION FOR WRIT OF CERTIORARI FILED DECEMBER 10, 1980.
CERTIORARI GRANTED, MARCH 9, 1981.
ADDISON C. GETCHELL & SON, INC. - THE LAWYERS' PRINTER - BOSTON

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#3 Letter dated April 23, 1975 from Richard J. Walsh to Herbert T. Salter regarding Termination of Collective Bargaining Agreement 104

#4 Letter dated November 21, 1975 from Charles D. Bonanno to Linen Supply Negotiating Committee 106

#5 Letter dated November 24, 1975 from Richard J. Walsh regarding Linen Supply Companies Negotiation 108

#6 Company's Agreement between Union (portions) ..111

#7 Letter dated April 29, 1976 from William J. McCarthy to Mr. Charles D. Bonanno 117

#8 Letter dated May 3, 1976 from Joseph E. Lepie Expressing view that Company is Unbound by Collective Bargaining Agreement with Union 118

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NATIONAL LABOR RELATIONS BOARD

In the Matter of: Charles D. Bonanno Linen Service, Inc.
Board Case No. 1-CA-11628

4.9.76	Charge filed
5.4.76	Amended Charge filed
5.20.76	Complaint and Notice of hearing, dated
6.2.76	Respondent's Answer, received
8.27.76	Stipulation signed by Respondent, Charging Party and General Counsel, dated
8.30.76	Hearing opened
8.30.76	Hearing closed
12.20.76	Administrative Law Judge's Decision issued
1.24.77	Charging Party's Exceptions to the Administrative Law Judge's Decision, recevied
1.24.77	Respondent's letter requesting Oral Argument, dated
1.26.77	Respondent's Exceptions to the Administrative Law Judge's Decision, received
1.31.77	Charging Party's Memorandum in Opposition to Respondent's Exceptions, dated

5.12.77 Decision and Order of the National Labor Relations Board, dated

8.6.79 Supplemental Decision and Order of the National Labor Relations Board, dated

PROCEEDINGS BEFORE THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT
NLRB v. BONANNO LINEN SERVICE, INC.
630 F2d 25 (1st Cir. 1980)

10.16.79 Application for Enforcement filed by National Labor Relations Board with the United States Court of Appeals for the First Circuit

10.18.79 Answer of Charles D. Bonanno Linen Service, Inc. to Application for Enforcement filed with the United States Court of Appeals for the First Circuit

11.7.79 Leave granted by Court of Appeals to Teamsters Union No. 25 a/w International Brotherhood of America to intervene in the Enforcement proceedings

5.6.80 Oral Argument

9.12.80 Decision of U.S. Court of Appeals the First Circuit issued decree entered enforcing the Order of the National Labor Relations Board

10.2.80 Motion to stay enforcement of the Court's Decision and Decree filed by Charles D. Bonanno Linen Service, Inc.

10.6.80 Order of court staying the operation of its decree entered September 12, 1980 pending a final decision of the Supreme Court of the United States upon a Petition for Writ of Certiorari filed by Bonanno

PROCEEDINGS BEFORE THE
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CHARLES D. BONANNO LINEN SERVICE V.
NATIONAL LABOR RELATIONS BOARD CASE NO. 80-931

12.10.80 Petition for Certiorari filed

3.9.81 Certiorari granted

Notation to Decisions Below

The following opinions, decisions, judgment, and orders have been omitted in printing this appendix because they appear on the following pages in the appendix to the Petition For Writ of Certiorari.

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CHARLES D. BONANNO LINEN SERVICE, INC.	
— and —	DOCKET NO. 1-CA-11,628
TEAMSTERS LOCAL UNION NO. 25, a/w INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA.	

Exceptions to the Decision of the Administrative Law Judge on Behalf of Teamsters Local Union No. 25

Now comes Teamsters Local Union No. 25, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Charging Party herein, and excepts to the Decision of the Administrative Law Judge (hereafter "ALJ") in the following respects:

1. The Charging Party excepts to the ALJ's failure to conclude (ALJ Decision, pg. 4, lines 8-15) that Bonanno's withdrawal from the multi-employer negotiations was prompted by its disagreement with other members of the multi-employer association over whether the association should change its bargaining strategy by proposing a new and significantly higher wage offer to the Union. As grounds for this exception, the Charging Party states that the testimony at T. 44-45, 66-70, and 82-86 and inferences reasonably drawn therefrom demonstrate that the multi-employer negotiating team was seriously considering a new and sig-

nificantly better wage offer to the Union immediately prior to Bonanno's withdrawal and further demonstrate that Bonanno's withdrawal was prompted by its disagreement with other association members over making such an improved wage offer.

2. The Charging Party excepts to the ALJ's failure to conclude (ALJ Decision, pg. 4, lines 8-15) that Bonanno's decision to withdraw from the multi-employer negotiations rather than support or participate in an improved wage offer by the multi-employer association, as a matter of law, precluded a finding that unusual circumstances existed to justify its withdrawal irrespective of whether or not an impass in negotiations would normally permit a withdrawal by an employer member of a multi-employer unit. As grounds for this exception, the Charging Party states that Bonanno's conduct as herein described impeded and interfered significantly with fair and good faith collective bargaining between the multi-employer association and the Union and thus, should not be viewed as a legitimate reason to support the withdrawal, but rather should be viewed as sufficient cause, in and of itself, to support a finding that Bonanno violated Sections 8(a)(1) and (5) of the Act.

In all other respects, the Charging Party concurs with and adopts the ALJ's Decision.

Respectfully submitted,

For the Charging Party, Teamsters Local Union No. 25, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,

By their Attorney,

Alan J. McDonald
Grady and McDonald
75 Federal Street, Suite 511
Boston, MA 02110
Tel. (617) 426-9450

DATED: 1/19/77

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CHARLES D. BONANNO LINEN SERVICE, INC.	*	
and	*	CASE NO. 1-CA-11,628
TEAMSTERS LOCAL UNION NO. 25, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA	*	

Respondent's Exceptions to Decision of Administrative Law Judge

Charles D. Bonanno Linen Service Inc., Respondent herein, by its undersigned Attorneys, hereby excepts to the following Findings of Fact and Conclusions of Law contained in the Decision of Administrative Law Judge James M. Fitzpatrick dated December 20, 1976:

1. Finding contained on Page 3, lines 38-40 that, "The fact that the Union struck only Bonanno is not a circumstance which justified Bonanno's later withdrawal from the Group".

2. Finding on Page 4, lines 21-24 that, ". . . the Group was not thereby fractured in a manner warranting withdrawal by others in the Group".

3. Failure to find on Page 4 at line 36 that the Union did not at any time between November 21, 1975 and April 29, 1976, make a demand orally or in writing on the Respondent

that it meet for the purpose of collective bargaining either individually or as a member of the Group or that it continue to be represented by the Group for the purpose of collective bargaining.

4. Finding on Page 4, lines 41-43 that, "... the difference in personnel was not such a circumstance as would justify withdrawal from the Group".

5. Finding on Page 4, lines 45-46 that, "Use of such normal measures are not 'unusual circumstances' which justify withdrawal from group bargaining".

6. Finding on Page 5, lines 19-20 that, "... the circumstance of an ongoing impasse (are) an insufficient reason for Bonanno to have withdrawn from the Group".

7. Finding on Page 5, lines 21-23 that, "... unless the Union went along with the withdrawal ..... Bonanno had a continuing duty to participate in group bargaining, a duty which it violated by withdrawing".

8. Finding on Page 7, lines 10-11 that the filing of Unfair Labor Practice Charges on April 9, 1976, stands as a "constant union assertion" that Bonanno was bound to group bargaining.

9. Finding on Page 7, lines 18-20 that, "... the Union did not, directly or by implication, consent to, nor acquiesce in, Bonanno's withdrawal from Group bargaining".

10. Finding on Page 7, lines 35-43 that, "Bonanno was obliged to bargain with the Group, that its attempt to withdraw while negotiations were in progress was not timely nor justified by the circumstances, including the ongoing impasse and the selective strike, and since the withdrawal the Union has neither consented to nor acquiesced in the withdrawal nor should it be estopped now from claiming that Bonanno is bound to the agreement reached with the Group. Bonanno's refusal to honor that agreement is, and has been, a breach of

its duty to bargain in good faith and is an unfair labor practice within the meaning of Section 8(a)(5) and (1) of the Act".

11. Finding on Page 8, lines 4-9 that, "The activities of Bonanno set forth in section II, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce".

12. Conclusion of Law No. 3 that, "The Union is, and has been at all material times, the exclusive bargaining representative of the employees of Bonanno in the following appropriate unit:

> All linen supply truck drivers and helpers employed by members of the New England Linen Supply Association, exclusive of all other employees, office clerical employees, guards and all supervisors as defined in Section 2(11) of the Act."

13. Conclusion of Law No. 4 that, "By its refusal to adopt the agreement reached between the Union and the Group bargaining on behalf of members of the New England Linen Supply Association, and by its refusal to give effect to the terms and conditions contained therein, Bonanno engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act".

14. Conclusion of Law No. 5 that, "The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act".

15. The proposed Remedy contained in the Paragraph commencing on Page 8, line 42 and ending on Page 9 at line 9.

16. The proposed Order commencing on Page 9 at line 15 and ending on Page 10 at line 25.

Dated: Boston, Massachusetts
January 21, 1977

CHARLES D. BONANNO LINEN SERVICE, INC.

By Sidney A. Coven
Lepie & Coven
Attorneys for Respondent
10 Tremont Street
Boston, Massachusetts 02108

OFFICIAL REPORT OF PROCEEDINGS

BEFORE THE

National Labor Relations Board

Docket No. 1-CA-11,628

IN THE MATTER OF:

CHARLES D. BONANNO LINEN SERVICE, INC.

— and —

TEAMSTERS LOCAL UNION NO. 25, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

PLACE: Boston, Massachusetts

DATE: August 30, 1976

PAGES: 1 - 104

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[1]

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION ONE

In the Matter of:	:	
CHARLES D. BONANNO LINEN SERVICE, INC.	:	
— and —	:	Case No. 1-CA-11,628
TEAMSTERS LOCAL UNION NO. 25, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA.	:	

Hearing Room 1
12th floor
Keystone Building
99 High Street
Boston, Massachusetts
Monday, August 30, 1976

The above entitled matter came on for hearing, pursuant to Notice, at 11 o'clock a.m.

BEFORE:

Honorable, JAMES M. FITZPATRICK, Administrative Law Judge

APPEARANCES:

FRANCIS X. MCDONOUGH, Esq., Region One, National Labor Relations Board, Keystone Building, 99 High Street, Boston, Massachusetts; appearing as Counsel for the General Counsel.

ALAN J. MCDONALD, Esq., Law firm of Grady & McDonald, 75 Federal Street, Boston, Massachusetts 02110; appearing on behalf of the Charging Party.

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APPEARANCES (Continued):

SIDNEY A. COVEN, Esq., Law firm of Lepie & Coven, 10 Tremont Street, Boston, Massachusetts 02108; appearing on behalf of the Respondent.

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Proceedings

11:10a.m.

JUDGE FITZPATRICK: The hearing will be in order.

This is a formal hearing before the National Labor Relations Board in the matter of Charles D. Bonanno Linen Service, Inc., and Teamsters Local Union No. 25, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Case No. 1-CA-11,628.

The Administrative Law Judge conducting the hearing is James M. Fitzpatrick.

All parties have been advised of procedures in Board hearings by service of a statement of procedures along with the Notice of Hearing and Complaint.

Will counsel now please state their appearances for the record, and begin with the General Counsel.

MR. MCDONOUGH: Francis X. McDonough, Counsel for the General Counsel, 99 High Street, Boston, Mass., 02110.

JUDGE FITZPATRICK: For the Charging Party?

MR. MCDONALD: Alan J. McDonald of Grady & McDonald, 75 Federal Street, Boston.

JUDGE FITZPATRICK: For the Respondent?

MR. COVEN: Sidney A. Coven from Lepie & Coven, 10 Tremont Street, Boston, Mass. 02108.

JUDGE FITZPATRICK: Thank you, gentlemen.

Before the hearing, I asked the counsel if there

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was any way of disposing of the matter other than by trial, and I was told it had been discussed and settlement could not be reached at this time. You all understand that those of us who hear these cases and decide them have a selfish interest

so that if they can be disposed of in another way; so that if at any time a ray of light appears, even though it is a faint one, that any of you think might be a basis for a resolution of this matter without litigation; I would be pleased to hear about it and give you a reasonable time to explore it.

MR. McDonough, will you offer the formal papers?

MR. MCDONOUGH: Yes, Your Honor.

General Counsel's 1(a) through 1(h) are the formal papers in this proceeding. The parties have both been shown the documents and I would offer them in evidence now.

(The documents above referred to were marked General Counsel's Exhibit No. 1(a) - 1(h) for identification.)

JUDGE FITZPATRICK: Any objections?

MR. COVEN: No objections.

MR. MCDONALD: No objections.

JUDGE FITZPATRICK: General Counsel's 1(a) through (h) are received in evidence.

(The documents above referred to, heretofore marked General Counsel's Exhibit No. 1(a) - 1(h) for identification, were received in evidence.)

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JUDGE FITZPATRICK: Mr. McDonough, I have read over the Complaint and Answer, and I don't want to anticipate what you or other counsel would do in the case; but Paragraph 8 of the Complaint alleges or describes the unit and that is denied. Is there a real issue in your opinion as to unit here?

MR. MCDONOUGH: There is no real issue as to unit here. I discussed with Mr. Coven—first of all in the interest of expediting this hearing, Charging Party, General Counsel and Counsel for the Respondent have worked out a stipulation which obviates the necessity for most testimony, and also,

Mr. Coven I believe is going to move to amend his Answer or at least to clarify his Answer, so that points such as that on the unit issue will not be muddied. There is no real contention, I don't believe, on the unit.

If you like, we can introduce the stipulation—

JUDGE FITZPATRICK: No, I just wanted to raise the question—

MR. MCDONOUGH: No, I don't believe there is any real issue in the unit description, is that right, Mr. Coven?

MR. COVEN: No, sir. A series of stipulations that will be received, I think will be able to explain to you what our contentions are.

Our contentions don't include any contentions as to the inappropriateness of the unit. There is certain or were certain technical denials made in the Answer because of the way

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the Complaint was phrased, and what we considered to be misnomers of the group, which was engaged in group bargaining: and as a result we denied certain parts of the Complaint, but with the stipulation we have worked out I think we can agree on what was then an appropriate unit, which we now contend is no longer an appropriate unit. And I think, I can explain more for you when we get into the case.

JUDGE FITZPATRICK: Thank you, Mr. Coven.

Mr. McDonough there is no real issue with respect to commerce I take it?

MR. MCDONOUGH: There is no real issue with respect to commerce.

MR. COVEN: We will stipulate commerce.

JUDGE FITZPATRICK: Thank you.

Do you wish to make an opening statement, Mr. McDonough?

MR. MCDONOUGH: Yes, Your Honor.

This case, Your Honor, as involves and will be set forth more clearly in the stipulation of the parties that have been agreed to, involves the history of bargaining, is an Employer's group of some ten or 12 companies.

Back in approximately January or February of 1975, the Group notified the Union and the Union notified the Employer's Group that they wished to make changes in the contract, which was expiring on or about April 18th, and they continued to bargain and at some point reached an impasse. The impasse, the

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key issue that created the impasse I believe, involved whether the drivers would be continued to be paid on a salary basis or whether it would be changed to paying them on a commissioned basis.

At a point in June of 1975, the Union struck the Respondent company here and most, but not all of the remaining companies locked out their employees. This situation continued from approximately June 23rd, until approximately November 21st of 1975. At which time the—and there will be some testimony on this particular point—at which time the Employer-Respondent, Bonanno, communicated to the Union, telling them that it had withdrawn from the Employer Group.

It is the contention of the General Counsel—excuse me—the remaining parties continued to bargain until March 13th of 1976—March or April 13th of 1976, at which point the remaining members of the Employer's Group reached agreement. And, shortly after that a request was made for Bonanno to adopt and sign the contract, which it refused to do. This charge was filed and an investigation took place in this, and

these proceedings are now under way on the basic theory that an Employer once part of a multi-employer group cannot withdraw from that group once negotiations have commenced, even though an impasse has taken place, cannot withdraw from that group. Because either of the necessary elements, the consent of the Union was not present, nor were there any

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unusual circumstances. And, as the Board has held, an impasse does not constitute circumstance.

General Counsel recognizes, Your Honor, that this case is based on Board law and, also, recognizes that the Circuits, at least four of the Circuits have held otherwise. But there is no decision in the First Circuit.

JUDGE FITZPATRICK: Have any Circuits held in favor of the Board?

MR. MCDONOUGH: None to my knowledge, Your Honor.

JUDGE FITZPATRICK: So your theory is that the effort, you maintain, of attempted withdrawal was untimely in that bargaining was in progress allbeit there was an impasse at the time?

MR. MCDONOUGH: That's correct.

JUDGE FITZPATRICK: Mr. McDonough, how long do you think this trial will take?

MR. MCDONOUGH: Through the cooperation of all the parties we have been able to work out a written stipulation as to most of the facts, and I think we can clarify some of the Answers, that I know are still left as denied.

Mr. Coven, as we talked about, with Paragraph 8, the unit question, that are not really in contention. The General Counsel intends to call one witness, Your Honor, who will be very brief.

The other parties, I can't answer for; it shouldn't take too long.

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JUDGE FITZPATRICK: Are you going to have exhibits over and above the formal papers?

MR. MCDONOUGH: I don't intend to, and I don't intend to have any others than the stipulation which includes eight Joint exhibits which are attached and made a part of it.

JUDGE FITZPATRICK: Mr. McDonald, do you have an opening statement?

MR. MCDONALD: I would simply indicate for the record, Your Honor, that although I concur with the legal theory stated by Mr. McDonough, that is to say that even if an impasse existed at the time that the withdrawal occured, violation of the Act occured.

I would further state that there is a factual question as to whether or not on November 21st, 1975, whether or not the impasse in fact had been broken or existed; and that if it in fact had been broken at that time it would be the second legal theory to support the Complaint in this case, as well as the theory advanced from Mr. McDonough.

JUDGE FITZPATRICK: Are you saying that you will recommend there was no impasse?

MR. MCDONALD: We said there was an impasse, but circumstances wherein the time of change that the time the withdrawal occured, that therefore even if one applied the law of the Circuits who have ruled on this question, a violation still would be found in this matter; because the right to withdraw

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did not exist because of the changed circumstances.

JUDGE FITZPATRICK: Mr. McDonald, do you propose to offer witnesses?

MR. MCDONALD: There will be one witness to testify at this point, Your Honor.

JUDGE FITZPATRICK: What about exhibits?

MR. MCDONALD: I have no further exhibits other than those attached to the stipulation.

JUDGE FITZPATRICK: How long do you think your witness will take?

MR. MCDONALD: Half an hour maximum on direct examination, relatively short.

JUDGE FITZPATRICK: Mr. McDonough, do you expect to finish today?

MR. MCDONOUGH: I would hope so.

JUDGE FITZPATRICK: Do you agree with that, Mr. McDonald?

MR. MCDONALD: Yes, I would, depending upon the Respondent's case.

JUDGE FITZPATRICK: Mr. Coven, do you have an opening statement?

Mr. COVEN: First, I will say that concurring with Mr. McDonough, I don't think this hearing should go beyond a day. It is unlikely as I see it, that it should go beyond a day, possibly till tomorrow morning; but I don't think that is very likely. We have stipulated to most of the material facts,

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and that stipulation will be entered as evidence. And the stipulation, of course, does not preclude any of the parties from offering additional evidence.

We intend to offer perhaps, two witnesses, we might have to call a third at this point; but I think two witnesses should do it.

The stipulation basically sets forth the facts with respect to the group bargaining here. And, so I indicated earlier, there

were certain technical denials in the Complaint; because, among other things, they talked about certain other—or they used the names of certain associations as the bargaining group, which were not actually so. We have stipulated, and the parties agree, that a group which we call the Employer's Group, bargaining with the Union for what was at the time the bargaining started, an appropriate unit consisting of all the truck drivers and helpers of various linen supply companies, which were members of this Employer's Group.

Negotiations began in March of 1975 and it developed after a number of meetings that the parties did reach an impasse,which revolved mainly about the question as to whether or not the drivers should be paid on commission basis, which was the demand of the Union, or whether they should be paid on an hourly basis, as they had been under the previous contracts. Incidently, I might say that in the past, the group had bargained with the Union had reached an agreement on a contract,

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this was the last contract in 1972; and they all signed individual and identical contracts with the Union.

On or about June the 23rd of 1975, the Union called a strike—not against all the members of the group, but only the Respondent herein—and I think it would be simpler to refer to the Company as Bonanno from here on in—they called a strike against Bonanno at which point the other members of the group all, or substantially all, locked out their employees; and the parties continued to operate from, there on in.

There were continuing negotiations, and on November the 21st, Bonanno, taking the position that because of the continuing or because there had been a continuing impasse withdrew from the group; served notice on the group as well as giving notices to the Union.

Now, it is our contention, Your Honor, that the Company, in view of the circumstances had a right to withdraw from the group at that time, in view of all the circumstances, including of course the strike, the fact that there was a strike against Bonanno and not the other companies, and because of the continuing impasse that Bonanno had a right to withdraw from the group bargaining.

We recognize, of course, that the Board law is not or has not reached a point where the Board agrees that an impasse gives an Employer a right to withdraw from the group, although as Mr. McDonough points out there have been four different

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circuit courts, which we will cite, Your Honor, in our brief after the close of the hearing, all to the contrary.

JUDGE FITZPATRICK: Has the Board spoken recently on this point?

MR. COVEN: They haven't, as far as I know, had any cases involving this point, since the last circuit court decision, which was a decision in the Third Circuit, NLRB, The Beck Engraving Comany, which was in 1975.

As far as I know, the Board has not been confronted, or at least they haven't decided any case on the question since then; but that is our primary position.

Our secondary position is that even in any event, the facts and circumstances since the withdrawal show that the Union in effect assented to the withdrawal, and even if the Board does not recognize the impasse, gave the Company the right to withdraw, we say that we are within the scope of Board law in taking the position that there has been a, in effect an assent or consent by the Union to the withdrawal, based on all of the circumstances which have occured since the withdrawal.

And, among other things, the testimony will show, and I think the stipulation contains some of the material facts, the parties continued to bargain, that is the remainder of the Group continued to bargain; the union continued to bargain with the group, never took the position that Bonanno would

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be bound by any contract that might be entered into, and they didn't actually bargain, and despite Mr. McDonald's statement, that there was no impasse, the facts will show, we say will show that an impasse continued at least and until April 13th of 1976, when the Union finally withdrew its position that the Employees should be paid on a commission basis, and the parties, the then parties, the people who remained in this group entered into an agreement.

We say the complete facts and circumstances, and we will have testimony on this, Your Honor, show that in any event there was a implicit agreement by the Union to the withdrawal in that the Union at this late date, and they made no demand on Bonanno until after they had reached their agreement with the remaining members of the group, they should not be heard at this time, to say that Bonanno had no right to withdraw from the group. That's about all I can say at this point, Your Honor.

JUDGE FITZPATRICK: Are you arguing an Estoppel Theory?

MR. COVEN: That's part of it.

We say that, number one, there was an implied assent that the Union should be stopped from taking the position that Bonanno was bound by those agreements, since in effect they continued to bargain, they reaped the benefits of the bargaining, a lock-out was terminated as soon as Bonanno withdrew from the group; and the Union didn't take the position

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at that time that they didn't recognize Bonanno's withdrawal. They recommenced and they continued bargaining; and, as I said, they should not be heard at this time, to contend that Bonanno should be bound by the new agreement.

JUDGE FITZPATRICK: Just a matter of information, did bargaining continue during the strike?

MR. COVEN: Yes.

JUDGE FITZPATRICK: Mr. McDonough, you may proceed.

MR. MCDONOUGH: Your Honor, by agreement of the parties we have worked out a stipulation of agreement to most of the facts in this case with reservation on the last page of the stipulation that any party may introduce any relevant testimony. However, this stipulation covers most of the ground, I believe, and there are eight exhibits attached to it. And I would like this marked for identification as Joint Exhibit No. 1, and I would offer it in evidence, Your Honor.

JUDGE FITZPATRICK: Any objection?

MR. MCDONALD: No objection.

MR. MCDONOUGH: Maybe we should mark this as Joint Exhibit A, since there is Joint Exhibits 1 through 8 attached.

(The document above referred to was marked as Joint Exhibit A (1 through 8) for identification.)

JUDGE FITZPATRICK: There being no objection, Joint Exhibit A is received.

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(The document above referred to, heretofore marked Joint Exhibit A(1 through 8) inclusive, for identification, was received in evidence.)

JUDGE FITZPATRICK: Is this something I should read?

MR. MCDONOUGH: Yes, I think you should, Your Honor, then it will be—

JUDGE FITZPATRICK: I will take a brief recess now, and I will come back when I am done reading.

(a short recess was taken.)

JUDGE FITZPATRICK: On the record.

Mr. McDonough?

MR. COVEN: If You want me to clarify. Mr. McDonough, has asked me if I would clarify our position with some of the denials in our Answer.

I don't think it is necessary for us to amend our Answer, but I will make clear that despite our denials in the Answer, we are not contesting the fact that a unit consisting of the drivers and the helpers of the members of the Employer's Group was appropriate at the time that bargaining commenced.

We are, of course, taking the position that we are not bound by that unit once Bonanno withdrew. Bonanno's withdrawal changed the appropriateness of the unit. As a matter of fact, it is going to be our contention really that the Union itself by commencing a strike against Bonanno and not against the other members of the group in effect fractured the unit; but we are not going to contest the fact that this unit was

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appropriate for purposes of collective bargaining at the time the bargaining commenced.

JUDGE FITZPATRICK: Would you say, without giving away any legal position you might have, that as of this time there doesn't appear to be a unit issue for litigation before me in this particular proceeding? You do not see an issue to be litigated right now?

MR. COVEN: The only issue to be litigated really is whether or not the Unit, which had been appropriate, was fractured either by the action of the Union in striking against Bonanno or—and/or by Bonanno's withdrawal. That is the issue to be presented to you; but the appropriateness of the unit up to that point is not an issue.

JUDGE FITZPATRICK: I see.

MR. COVEN: Now, also with respect to commerce, there were certain technical denials that were made because the Complaint spoke of various associations which are not really part of this case; we will agree that Bonanno is engaged in commerce within the meaning of the Act. That Bonanno's operations fall within the large jurisdiction, that is, Bonanno purchases at least a minimum of $50,000 of various supplies and other materials from outside the State, and we will agree that Bonanno was subject to jurisdiction of the Board.

I don't think it is material as to whether this association, which is named in the Complaint, or the Employer's Group

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itself, which is named in the stipulation, were themselves engaged in commerce. I don't think that is material—

JUDGE FITZPATRICK: Let me ask Mr. McDonough—in presenting his case, are you going to rely on the fact that the association, the contention that this association is in commerce—

MR. MCDONOUGH: Not necessarily, Your Honor.

JUDGE FITZPATRICK: If you have an admission that the Respondent is in commerce, will that suffice?

MR. MCDONOUGH: I think that will suffice: because our fortior, as part of the Employer's Group up until attempting to withdraw, and then the jurisdiction continued.

JUDGE FITZPATRICK: I don't see that we have a commerce issue.

MR. COVEN: No, I don't either, Your Honor.

I am not sure what else, Mr. McDonough, you wanted me to clarify, I will be happy to make a statement.

MR. MCDONOUGH: Let me just say, in Paragraph 9 of the Complaint, the issue that the Union represented the employees in the appropriate unit set forth in Paragraph 8; I think Mr. Coven's argument is the same.

MR. COVEN: Yes, we will agree that the Union did, at the time of commencement to negotiations, represent the majority of the employees within that unit, that is the unit composed

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of the employees of the Employers' Group.

JUDGE FITZPATRICK: Is that sufficient for your purposes?

MR. MCDONOUGH: That is sufficient, Your Honor.

I think, just to clarify a little further, Paragraph 10 is taken care of in the stipulation by Joint Exhibit No. 4, attached to it; and I think Mr. Coven will agree with that.

MR. COVEN: We do agree that Bonanno did authorize the negotiating committee of the Employer's Group to act in its behalf in negotiation of the contract, that was on February 19th, of 1975.

JUDGE FITZPATRICK: There is no question that the Respondent at one point was a member of the Group?

MR. COVEN: No question at all.

JUDGE FITZPATRICK: Thank you.

MR. MCDONOUGH: And in Paragraph 11, I think it speaks for itself from the Complaint, "On or about November 21, 1975, Respondent, by letter attempted to revoke its authorization . . .", I used the word "attempted" in the Complaint, and Mr. Coven's position I believe is that the attempt was effectual.

MR. COVEN: And, also he spoke of the Association rather than the Employer's Group, and for technical reasons we couldn't agree that even attempt to withdraw from this particular association that he speaks of, which has nothing to do with this case.

JUDGE FITZPATRICK: Was paragraph was that now?

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MR. MCDONOUGH: That was 11, I believe.

JUDGE FITZPATRICK: There is no real issue is what you are saying?

MR. COVEN: No

MR. MCDONOUGH: No.

And Number 12 is conclusionary.

JUDGE FITZPATRICK: Yes.

MR. MCDONOUGH: Number 13 is taken care of in the stipulation, Paragraph 15, in Joint Exhibit No. 6, and I think Mr. Coven will agree to that. Is that correct?

MR. COVEN: Well, we will agree that the remainder—we did agree that the remainder of the employer's Group did reach an agreement with the Union on April 13th of 1976; and Mr. McDonough has included a copy of the agreement as part of the stipulation.

JUDGE FITZPATRICK: The stipulation will speak for itself, I guess.

MR. MCDONOUGH: All right, thank you.

MR. COVEN: May I ask one question, Your Honor, before we start, on ground rules here?

As I understand it, Mr. McDonough, Counsel for the General Counsel, has control of the case. It is his Complaint. And he is going to support his Complaint with testimony, basically, of course, the stipulation does give most of the material facts.

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Now, it seems to me that if Mr. McDonald has any witnesses in support of the Complaint that he wishes to offer, I think they should be offered through Mr. McDonough. I am not sure just what the—Your Honor's policy is with respect to these matters. I know that in the past my experience with the Board, and with the Administrative Law Judge's or Trial Examiners before they became Administrative Law Judge's, some Judges permit the Charging Party to offer witnesses of his own, others in my experience, enunciate a policy that any witnesses in support of a Complaint must be General Counsel's witnesses. And, I am just wondering what your ground rules are?

JUDGE FITZPATRICK: In any particular proceeding, of course, it depends on how the question arises, in this particular type of proceeding of course you have two parties, that at one point were bargaining; and you have a contention that there has been refusal to bargain. My understanding is that the Board will extend to the point that General Counsel has responsibility and the discretion to frame the case as he sees fit in support of the Complaint, and to call such evidence as he wishes.

To require him to call witnesses proposed by another party would deprive him of that independence, accordingly he cannot be compelled to call witnesses he does not choose to call.

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On the other hand, the Board has spoken, and it is my understanding that the Charging Party is a party to the proceeding, and may offer evidence in support of a Complaint, even though the evidence may go to a variant theory of the Complaint; and that the Board considers this appropriate

because in the final analysis it may adopt that position and reject that of General Counsel's or at least as the position is presented to it.

Those would indicate what my ground rules would be. I would receive evidence in support of the Complaint if offered by the Charging Party. So, I think what I will do is I will ask Mr. McDonough to offer his evidence, and then I will look to Mr. McDonald, and ask him whether he has evidence to offer and then look you you, Mr. Coven.

At that point you will have presented all of the evidence in chief from both of the opposing parties, and you can see more clearly then how your situation stands.

I will follow the same order in asking counsel to question witnesses. If Mr. McDonough calls witnesses, he will question the witness first, and I will then look to Mr. McDonald to question the witness, and then to you. Mr. McDonald's witnesses, if he calls any, I will have him question the witness first, and the I will look to Mr. McDonough, and then I will look to you. If you call witnesses I will look to you to question the witnesses first, and then I will look to Mr.

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McDonough, and then I will look to Mr. McDonald.

All right.

Mr. McDonough, you may proceed.

MR. MCDONOUGH: Thank you, Your Honor.

The General Counsel calls Herbert Salter.

Whereupon,

HERBERT T. SALTER

was called upon as a witness, by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

JUDGE FITZPATRICK: Please be seated and give your name and address to the Reporter.

THE WITNESS: Herbert T. Salter, field representative, Teamsters Local 25, 544 Main Street, Charlestov .i, 02129.

DIRECT EXAMINATION

Q. (By Mr. McDonough) Mr. Salter, in your role you stated you were field representative for the Charging Party, Local 25. In your role as field representative, do you from time to time become involved in contract negotiations?

A. I do.

Q. And where you involved in negotiations between the Employer's Group, at least at the commencement, starting of it with Mr. Bonanno and Local 25, were you involved in those negotiations?

A. I was.

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Q. I am going to show you a copy of what has been introduced into evidence as Joint Exhibit 4 attached as a part of Joint Exhibit A, the stipulation referred to previously; and ask if you have seen that document?

A. I have.

Q. Have you received a copy of this document?

A. Yes, I have.

Q. Do you recall when you received a copy of the document?

A. I believe it was November the 24th, 1975.

Q. Prior to November 24th, when you received that; did you have any conversation with the signatory of that, Charles D. Bonanno?

A. I did.

Q. Do you know Mr. Bonanno?

A. Yes, I do.

Q. Would you identify him in the room here today?

A. The gentlemen in the blue suit sitting at the table to the right of yours.

Q. Do you know his voice?
A. I do.
Q. Could you tell us the circumstances that preceded your receiving this letter?
A. I was told that someone had made an attempt to deliver the letter by hand to our office on Friday Afternoon, November 21, 1975; not being there I wasn't able to receive the message

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that was supposed to have come to me; but a gentleman identifying himself as Mr. Bonanno left two telephone numbers with the explicit request that I contact him at either one of these numbers in the course of the afternoon or early evening, which I did. And, he answered the phone, and he said he had a letter that he wanted to read to me over the phone, which he did.

In substance I would say it is the letter that I received. He told me I would be receiving it in the mail, at the earliest possible moment.
Q. And to the best of your recollection, the substance that he read to you was as you just have read this Joint Exhibit No. 4?
A. Yes, it was.
Q. All right.

Was there any other conversation at that time between you and Mr. Bonanno, other than what you have just said?
A. No, there wasn't.
Q. Did you say good bye or okay, or anything of that nature?
A. I know I said something to the effect that I would wait until I received the letter to confirm his telephone call.
Q. And is that as far as it went?
A. That was as far as it went.
Q. All right.

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Since November 21st to today, have you personally talked, either in person or by telephone, with Mr. Bonanno?
A. No, I haven't.
Q. All right.

MR. MCDONOUGH: Thank you, I have no further questions of this witness

JUDGE FITZPATRICK: Mr. McDonald?

MR. MCDONALD: I have no question at this time, Your Honor.

JUDGE FITZPATRICK: Mr. Coven?

CROSS EXAMINATION

Q. (By Mr. Coven) Mr. Salter, is your recollection very good as to just what the conversation entailed on that day, complete contents of the conversation?
A. I had very little to say.
Q. You do remember though that he read to you in effect what was contained in Joint Exhibit 4?
A. He said this was what he tried to deliver to me in the afternoon when I wasn't there.
Q. Did you ask whether he was going to mail a copy to you?
A. No, I did not.
Q. Did he say he was going to mail a copy to you?
A. He said he was.
Q. Do you remember what, if anything, you said to him

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after that?
A. Nothing, except that I would probably check with our attorney and wait until we got the letter before we got anything—
Q. That is your best recollection at that time?
A. That is my best.

MR. COVEN: No further questions.

JUDGE FITZPATRICK: Any redirect?

MR. MCDONOUGH: No, that's all, Your Honor.

JUDGE FITZPATRICK: Mr. McDonald, any questions?

MR. MCDONALD: Nothing, Your Honor.

JUDGE FITZPATRICK: Thank you, you may step down.

(Witness excused.)

MR. MCDONOUGH: General Counsel has no further witnesses to call, Your Honor.

JUDGE FITZPATRICK: Does that complete your case?

MR. MCDONOUGH: That completes my case in chief, with the reservation of calling Mr. Salter as a rebuttal witness.

JUDGE FITZPATRICK: Mr. McDonald, do you have any evidence to offer?

MR. MCDONALD: Mr. Louis Katz, please.

Whereupon,

LOUIS KATZ

was called upon as a witness, by and on behalf of the Charging Party and, having been first duly sworn, was examined and testified as follows:

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JUDGE FITZPATRICK: Please be seated, and give your name and address to the Reporter, and please spell your name.

THE WITNESS: Louis Katz, K-a-t-z, 50 Dinsmore Avenue, Framingham, 01701.

JUDGE FITZPATRICK: Mr. McDonald?

DIRECT EXAMINATION

Q. (By Mr. McDonald) Mr. Katz, you are here as a result of a subpoena issued by the National Labor Relations Board at my request in this matter, is that correct?

A. That's correct.

Q. What is your occupation, Mr. Katz?
A. Vice president of Standard Linen.
Q. That is a member of the Employer's Group that is involved in this hearing?
A. That's right.
Q. And, as vice president, have you been in charge of labor relations matters for Standard?
A. Yes, I have.
Q. During the course of the negotiations, prior to November 21st of 1975, you recall, were you not, that your employees walked out during this period of time.
A. From June 23rd to November; yes, sir, correct that it was June 24th.
Q. And were there meetings among the members of the Employer's Group during this period of time to discuss bargaining

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strategy?
A. Um-hum.
Q. And sometime in November of 1975, was a decision made to change the strategy that had been relied upon by the Employer's Group prior to that time—

MR. COVEN: I object.

JUDGE FITZPATRICK: What is the objection?

MR. COVEN: Object, it is immaterial. The Complaint alleges that—let me say this, the stipulation shows that there was bargaining during all this time in question. There is no allegation made of any bad faith bargaining.

The Union—the Company, the Employer's Group took various positions during the bargaining. What led up to the Employer's Group taking the various positions, any matters that went on within the Employer's Group, I maintain has absolutely no relevance to this proceeding.

The important question is what position did the Employer's Group take, the Employer's Group did bargain; there is no question of bad faith bargaining. As a matter of fact the Employer's Group did eventually enter into an agreement some four months after or five months after Bonanno withdrew. I therefore contend that to go into this is to go into an area that has absolutely no relevance to this proceeding.

JUDGE FITZPATRICK: What do you claim for the question?

MR. MCDONALD: Your Honor, we will take the position

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that a withdrawal of Bonanno from the Employer's Group was as a direct result of a change in position that the Employer's Group had with respect to its negotiations with Teamsters Local Union No. 25; and that this change in bargaining position was sufficient to put Bonanno on notice that if in fact the change of position would not end the impasse, at least the intent to introduce the position in negotiations would have changed the impasse situation and effectively broken it. It was therefore improper for him to withdraw after the change of strategy had occured.

MR. COVEN: May I—

JUDGE FITZPATRICK: Let me comment, it would appear to me, based on the theory propounded by the Union to be relevant. It is hard to say since I know very little about what happened here, what is relevant and what is not that relevant; and at first blush it would appear to be relevant to the theory he propounds.

Now, whether that theory is sound or not; I don't know.

You were going to say something?

MR. COVEN: Yes, Your Honor.

May I say that the stipulated facts show that there has or

had been an impasse on commissions, mainly on commission basis. The stipulation also shows, and it is agreed on by everybody, that even after Bonanno's withdrawal the parties continued to negotiate and it was only after several meetings

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which culminated in the meeting of April 13th, 1975, some five months later, almost five months later that the Union, the Union finally changed their position on the commissions and an agreement was reached that—which maintained the hourly rate of pay which was the position of the Employer's Group, the position they had taken.

So, if the impasse was broken by anybody, the impasse was broken only on April the 13th, 1975 when the Union withdrew its demand for commissioned payments. The stipulation shows that, and I don't see how anything that this witness might testify as to positions that the various members of the Employer's Group discussed during their own meetings has anything to do with the case.

JUDGE FITZPATRICK: Thank you gentlemen.

Objection overruled.

Continue.

Q. (By Mr. McDonald) Mr. Katz, I direct your attention back to the period before November 21st, 1975—incidently, I would like to show you a copy of Joint Exhibit 4, dated November 21st, 1975, to the Linen Supply Negotiating Committee, Mr. Charles D. Bonanno, indicating that an attempt to withdraw; and ask if you have ever seen that document before?

A. Yes, sir.

Q. Prior to November 21st, 1975, Mr. Katz, was there a meeting of the Employer's Group at which a change in strategy

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was discussed by the members, including yourself of this Employer's Group that was bargaining with Local 25?
A. At every meeting we had a change in strategy.
Q. Was there a change of strategy with respect to the wages issue that occured shortly before November 21st of 1975?
A. Are you talking the time Mr. Bonanno was a member of the group?
Q. Yes.
A. No, we stayed to the salary part of it only, if that is what you are referring to.
Q. When you say you stayed to the salary part, you mean you hadn't decided to go to the commission?
A. No.
Q. Was there a decision made with respect to increasing the salary?
A. There was some talk whereby the record shows we did make different offers during the time, which were goosed up.
Q. Directing your attention to shortly before the November 21st, the letter of Mr. Bonanno, was there a decision made by the Association to offer an increased salary proposal to the Local 25 bargaining unit?
A. Other than what I just told you, counsel, I don't remember when, but we did make offers of increasing from the first inception until that time; I don't remember all this up here,

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no way.
Q. Did Mr. Bonanno at any time shortly prior to November 21st, 1975, express an opinion with respect to an increased wage offer—
MR. COVEN: May I object, Your Honor.

Although this is somewhat different from what Mr. McDonoughs' contention is; Mr. McDonald's contention is, as I understand it and the reason you have allowed this in is that the change of position had broken the impasse.

Now, the witness has testified with respect to that matter. Now with respect to what Mr. Bonanno may or may not have said during those meetings, and in no way would have broken the impasse. The testimony is apparently that the impasse continued, and as I say, the facts show the impasse did continue until April 13th, when the Union withdrew its commission request.

I think Mr. McDonald is going beyond what Your Honor allowed him, the theory on which you allowed him to proceed was they had the impasse or claimed that the impass was broken.

The position Mr. Bonanno took during discussions has no relevance to the question of breaking the impasse.

JUDGE FITZPATRICK: How could it be admissable evidence in this proceeding, counsel?

MR. MCDONALD: Your Honor, I would simply indicate that

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if a decision was made by the Employer's Group to change the strategy, strategy that may very well have led to a contract and Mr. Bonanno refused to go along with the strategy; that we will take the legal position that at that point it would be a violation of the law for him to withdraw from the Employer's Group.

Simply, it indicates a change in strategy made, an objection to the withdrawing member to the strategy taken by the Group that he committed himself to belong to, and to conform to. And, when a change is made in strategy that may very well lead to the execution of a collective bargaining agreement; one dissident member decides no I am not going to go

along with this group anymore, I don't want to be bound by this group that is there negotiating for me as it appears there may be some success along those lines, I'm getting out. We think and we would take the position as a matter of law that he could not do that.

MR. COVEN: If Your Honor please—

JUDGE FITZPATRICK: Just a second, I will come to you. But doesn't that have to be on the issue involved here? The question here is whether there was or was not an impasse, right? And doesn't it have to deal with the particular thing that involved the impasse, the particular issue? I would assume without having any firsthand knowledge that the negotiating committee that is negotiating for a group would have many

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variations and many proposals and many disagreements on many issues, different kinds of things. When then given the wide range of topics that can be considered in bargaining of one who may want to withdraw expresses any disagreement on any one of the innumerable issues which might be discussed by the company, you would have him unable to withdraw?

MR. MCDONALD: The issue, was an issue which was holding up the parties, Your Honor, the issue was economics: how much money will you give your employees to continue working for you; and if it can be established that a position was taken to increase that economic offer to such an extent that the Union might agree, then I think it is reasonable to assume that the possibility existed for a break in the impasse. It wasn't a question of discussing whether or not there would be a uniform allowance or an unrelated issue; it was a central issue.

MR. COVEN: If I may, Your Honor, the question, and this

is from the witness's own testimony, the question was not of wages. The question was basically, and basically was whether or not the companies would agree to the Union's demand for commissions method of payment; and the witness himself has testified that there was no change in that basic strategy of resisting commissioned payment. And, the facts as stipulated show, actually, that the Union finally agreed to that position. The witness has testified that there may have been various

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offers made or different changes in offers made; but he has testified there was never any change in the basic strategy, that is his own testimony. And, I say therefore that whatever position Bonanno may have taken at any given moment with respect to a particular phase of an offer is not material. I think we will open ourselves up to all sorts of a Pandora's Box of going into what position did Bonanno take, what position did Katz take, what position did other members of the bargaining committee take; and it really doesn't matter.

JUDGE FITZPATRICK: I am not sure whether it does or not, at this point it seems to me it might matter to the Labor Board, accordingly I will overrule the objection.

Q. (By Mr. McDonald) Mr. Katz, again, directing your attention to shortly before November 21st, 1975, at your Employer's Group meeting, did Mr. Bonanno express an opinion with respect to a shift in strategy of offering a higher wage proposal to the Union?

A. I don't really recall, but during our negotiations we all had various thoughts—

MR. COVEN: Excuse me, may I interupt?

If the witness testifies he doesn't recall, I think that is an answer. For him to start testifying as to other matters that developed during negotiations is not responsive to the question.

JUDGE FITZPATRICK: It might not be responsive, but I view that as an objection. I am not sure that it is material

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or relevant though, and I will allow you to cut him off, and you can ask him another question on whatever line you want to.

Okay.

Q. (By Mr. McDonald) You do recall a meeting shortly before November 21st, 1975?

A. We have had meetings, I don't recall what date. We had meetings prior to that date.

Q. Let's say shortly before, within a couple of weeks?

A. I am sure we did.

Q. And isn't it true, that the majority of the associate Employer's Group decided they would like to offer a higher wage offer?

MR. COVEN: I object.

JUDGE FITZPATRICK: Overruled.

THE WITNESS: I think I am repeating myself, but throughout negotiations we always looked—

Q. (By Mr. McDonald) Would you please just attempt to direct your attention—

A. I don't really recall exactly. We always looked to close the negotiations to a higher hourly rate from a low point or a present point to date.

Q. Do you recall Mr. Bonanno saying that if that was the position of the Employer's Group that he was going to get out?

MR. COVEN: I object.

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JUDGE FITZPATRICK: Overruled.

THE WITNESS: I am trying to search my memory. I don't

really remember it. It is possible he said it. It is possible he didn't.

Q. (By Mr. McDonald) Do you recall telling Mr. Salter last Friday that in fact was what he said?

MR. COVEN: I object, he is cross-examining his own witness. He is trying to impeach the credibility of his own witness.

MR. MCDONALD: I am trying to refresh his recollection. He is a member of the Employer's Group, and I believe I should be given a little more leeway—

JUDGE FITZPATRICK: He is a Union witness.

Overruled, you may answer.

THE WITNESS: To my recollection I think he said it, I might have said it, I think everybody in the group said it at one given point. The money got too high, we said if that is going to be it, I don't want no part of it.

Q. (By Mr. McDonald) I want you to direct your attention to the period just before the withdrawal occured, and my question was: Do you recall telling Mr. Salter last Friday that in fact Mr. Bonanno said during this period that he would not go one penny higher and if that was the decision he would withdraw?

A. More or less.

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Q. Does that refresh your recollection as to what occured during this period?

A. (Witness nodded head.)

Q. Is your answer yes?

A. Yes.

MR. MCDONALD: Nothing further.

MR. MCDONOUGH: I have no questions of this witness.

JUDGE FITZPATRICK: Mr. Coven?

CROSS EXAMINATION

Q. (By Mr. Coven) Do you have any clear recollection of this conversation you spoke off?

A. You are talking about last Friday?

Q. No, I am talking about the alleged conversation which you say Mr. Bonanno made some reference to withdrawal?

A. Again, counsellor, I think we all said it in times of negotiations at one time or another. If you go another penny count me out—to that effect, what credence you want to take at that point . . . we did say it periodically, I think I said it myself that I would withdraw certain things and I said I would do certain things if they didn't agree on it.

Q. That is your best recollection now of what was said?

A. (Witness nodded head.)

Q. Can you tell us when Mr. Bonanno made this statement along the lines—

A. No way I could tell you what meeting this happened.

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Q. You have no way of knowing whether it was as early as perhaps May or June of 1975?

A. I know it is prior to November 23rd or 24th?

Q. That's because that is when he withdrew from the Association?

A. Right.

Q. All you know is sometime during the course of—

A. Negotiations.

Q. —negotiations, it might have been months before the 21st or before the 21st that Mr. Bonanno, like the rest of you, indicated that if things got unbearable he would have to get out or words to that effect?

A. Right.

Q. You were part of the negotiating committee?

A. Yes, sir.

Q. Did you attend the final meeting on April 13th of 1976? The final meeting when the final agreement was reached on the contract?
A. Um-hum.
Q. And that was where, at the office of the Federal Mediation Conciliation Service?
A. I believe so.
Q. And was that the first time that the Union had agreed to withdraw its demands for commissioned payments?
A. Yes, sir.

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Q. And who was the spokesmen for the Employer's Group at that meeting?
A. Mr. Walsh and Mr. Tom Reardon.
Q. And they had been the spokespem at all the meetings, is that correct?
A. Yes, sir.
Q. And they were the Employer's Groups' attorney?
A. Yes, both of them.
Q. The firm of Warner & Stackpole?
A. Correct.
Q. Located here in Boston?
A. Correct.
Q. Okay.

Do you remember at that meeting on April the 13th of 1975, whether there was any discussion as to whether or not the—Mr. Walsh or Mr. Reardon or the Employer's Group was negotiating for Bonanno?
A. Not at that meeting.
Q. Do you remember Mr. Walsh or someone saying at that meeting that, that they were not representing Mr. Bonanno any longer?
A. Yes, sir.

Q. And, to the best of your recollection, who made such a statement?

A. I know I heard it. I don't know if it came from our

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side or the Union's side, but somebody did say that whatever arrangements were made were not including Bonanno.

Q. I see.

A. It could be our legal—I am not too sure on that. I think it was them possibly.

MR. COVEN: I have no further questions.

JUDGE FITZPATRICK: Mr. McDonald, any more questions?

MR. MCDONALD: Yes, Your Honor.

REDIRECT EXAMINATION

Q. (By Mr. McDonald) Mr. Katz, again, directing your attention to the conversation you had last Friday with Mr. Salter; is it not true that you told him that the Employer's Group, shortly before the withdrawal, decided they were going to offer a higher wage increase—

MR. COVERN: Excuse me, may I hear the question? I'm sorry, I missed part of the question. May I hear it again? I think I am going to object to it.

JUDGE FITZPATRICK: Would you read it back, please?

(The pending question was read by the Reporter as follows:

"Q. Mr. Katz, again, directing your attention to the conversation you had last Friday with Mr. Salter; is it not true that you told him that the Employer's Group, shortly before the withdrawal, decided they were going to offer a higher wage increase—").

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MR. COVEN: I object to that as immaterial, and furthermore, it appears to be an attempt to impeach his own witness.

This was testified fully with respect to matters Mr. McDonald brought out, and this doesn't add anything to it.

JUDGE FITZPATRICK: I would agree, unless this is preliminary to something else.

A question as such, if answered, would not seem to add anything or help anything.

MR. MCDONALD: I think in view of one or two of the questions Mr. Coven asked, I think there was some ambiguity in the record with respect to what happened shortly before the November 21st withdrawal; and I would simply like to clarify the record on this matter, since it is important to the theory we are advancing.

JUDGE FITZPATRICK: I don't want to prevent you from clarifying matters. I will overrule the objection, and in my mind the question is preliminary, you may answer it.

THE WITNESS: Repeat the question please.

Q. (By Mr. McDonald) Do you recall Mr. Katz, your—in your telling Mr. Salter last Friday that shortly before Bonanno's withdrawal at a meeting of the Employer's Group, the Employer's Group had decided they were going to make an increased wage offer to the Local 25—

A. I did say that to him, and I hate to make a long story out of this, but—

Q. Your answer is yes, you did say that? Is that correct?

[45]

JUDGE FITZPATRICK: Did you finish your answer?

THE WITNESS: To the counsel; no.

JUDGE FITZPATRICK: Finish it.

THE WITNESS: Thank you.

Again, during negotiations we always looked at a higher rate, which we actually did to try to settle the thing—but I did tell that to Mr. Salter, and Friday, that we did raise the ante

up in the hourly wages. We agreed to a talk about it, and we did talk about it.

Q. (By Mr. McDonald) And what you told Mr. Salter was true?

A. Yes.

Q. And as a result of that Mr. Bonanno expressed the opinion that he would pay not one penny more—

A. I don't know if it was at that particular meeting.

MR. COVEN: I object. He is attempting to get the witness to vary his prior testimony, as a matter of fact he is attempting to impeach his own witness.

He is bound by the witness's testimony; this does not go into any cross examination on my part.

JUDGE FITZPATRICK: Overruled.

Q. (By Mr. McDonald) Do you recall telling Mr. Salter that after that decision was made Mr. Bonanno said he was not going to pay one penny more and that he was going to get out?

A. I think he said it.

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Q. And in fact, shortly thereafter he did get out, is that correct?

A. I don't know how close we are talking about, counsellor, he did say it—again, I am repeating my own self.

During the course of negotiations we did say that we raised it more, and that if we did this we would get out; how much prior to November 21st, I can't pinpoint the time.

Q. You told Mr. Salter Friday it was shortly before that—

A. Shortly before can be two months before or a month before—

MR. COVEN: I object.

JUDGE FITZPATRICK: Overruled.

THE WITNESS: Shortly before could be a month before.

Q. (By Mr. McDonald) You did recall telling Mr. Salter that?
A. Right.
Q. You further recall telling Mr. Salter that in your opinion that is the reason he got out?

MR. COVEN: I object to whatever his opinion was.

JUDGE FITZPATRICK: Sustained.

MR. MCDONALD: I have no further questions of the witness. I would just indicate the witness is here under subpoena and I request that he would remain for purposes of examination on rebuttal.

JUDGE FITZPATRICK: Any questions, Mr. McDonough?

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MR. MCDONOUGH: I have no questions.

JUDGE FITZPATRICK: Mr. Coven?

MR. COVEN: May I have a moment, please?

(Pause.)

RECROSS EXAMINATION

Q. (By Mr. Coven) Mr. Katz, do you remember at some time during the early stages of negotiations having some discussion with Mr. Bonanno—excuse me, I will withdraw that for a moment.

May I have a moment?

JUDGE FITZPATRICK: Yes.

(Pause.)

MR. COVEN: I will withdraw the question. I have no further questions of the witness.

JUDGE FITZPATRICK: Thank you, Mr. Katz, you are excused.

(Witness excused.)

JUDGE FITZPATRICK: Anything further, Mr. McDonald?

MR. MCDONALD: I have no further witnesses at this time.

JUDGE FITZPATRICK: Mr. Coven, what is your pleasure?

MR. COVEN: At this point move to dismiss the Complaint on the grounds that the testimony shows that there was a continuing impasse on November the 21st, 1975, which had continued from at least May, May 15th, 1975. And, the testimony shows further that the Union had struck the Bonanno Company on June the 23rd, and the strike continued at least

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until November—well, it is continuing as of this moment, as a matter of fact. The stipulation shows that this is true.

The testimony and the stipulation also shows that all of Bonanno's striking drivers had been permanently replaced between June the 23rd, and November 21, 1975. And, consequently, we move to dismiss on the grounds that these circumstances, including strike, the replacement of drivers, the continuing impasse gave Bonanno the legal right to withdraw from the Association. And this has been so held by four circuit courts of appeal, and including the latest case, NLRB against Beck in the Third Circuit; on that basis we move, Your Honor, to dismiss the Complaint on the basis that the General Counsel has failed to make out a case.

JUDGE FITZPATRICK: Mr. McDonough?

MR. MCDONOUGH: Yes, Your Honor, General Counsel's theory is based primarily on what is Board law, and in the latest most recent case which the Board decided this issue was that, and reiterated the long standing rules for withdrawal was Highway Billboards in 206 NLRB 22, Page 22, excuse me. Although it is true that the Circuit Court in that instance refused to enforce the Board's Order on its specific finding that impasse does not constitute—and the Board's specific finding, that impasse did not constitute an unusual

circumstance that would deprive the Employer of its economic viability,

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which I believe is the phrase that is used. That no permission to withdraw has been recognized by the Board.

I concede there are four circuits, as I said before, which have refused enforcement on almost identical issues as this; but it is still Board law, and as is the policy of the Board, there is no outstanding decision on this issue in the First Circuit.

JUDGE FITZPATRICK: Excuse me, what is the status of Highway Billboards? Enforcement denied?

MR. MCDONOUGH: Enforcement was denied in 500 Fed. 2nd, Page 181; its 87 LRR 2203.

JUDGE FITZPATRICK: Proceed, what circuit?

MR. MCDONOUGH: The Fifth Circuit, Your Honor.

The initial case is at 191 NLRB 244, and the remand of that case was at 473 Fed. 2nd 679, where the court sent the issue back to the board to determine whether or not that an impasse constituted an unusual circumstance to be sufficient to withdraw, to permit an Employer to withdraw from a multi-employer association.

The Board founded that an impasse was not sufficient to create an unusual circumstance and then on its petition for enforcement of its further order, the Fifth Circuit denied the Board's petition; that is the status of that case, but the Board law still stands and that is what General Counsel's theory is based on.

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JUDGE FITZPATRICK: When was that?

MR. MCDONOUGH: It was in 1974, Your Honor.

MR. COVEN: The Board case?

MR. MCDONOUGH: The Board case was in 1973.

JUDGE FITZPATRICK: You are advising me as to what General Counsel's theory is, and its current position is, up to date position. How do you know what the Board's position is, since I am bound by Board Law?

MR. MCDONOUGH: As am I, that is the Board's most recent decision on this particular issue, and there is no decision on this issue in the First Circuit, which is the jurisdiction of this Region.

JUDGE FITZPATRICK: Mr. McDonald, do you wish to be heard?

MR. MCDONALD: I would concur with remarks made by Counsel for the General Counsel.

I would further add that it is evident that the Board is and has not changed its position, since in the other circuits where this has been tested the Board position has remained the same, and the Board has remained consistent. And from that I think we can draw the inference that the Board, at least in those circuits which the issue has not been decided, will maintain its position until a decision by the circuit or perhaps by a decision by the United States Supreme Court.

JUDGE FITZPATRICK: I have in mind, Counsel, once

enforcement is denied in any particular case, that would seem to end litigation of the case; unless the Board would have a basis for seeking certiorari in the Supreme Court. I think they would be able to ask for it, only on the important question theory, since there doesn't appear to be a conflict of circuits here. I don't know whether this qualifies this kind of question or not.

Moreover, as you know, Board members serve staggered terms, and from time to time new members are appointed to

serve on the Board. Sometimes this makes a difference in the policy approach the Board takes, some basic proposition.

Mr. McDonough will remember the Collier case, for example. There was a sudden switch in position, and that case rose in this Region. So, I am wondering how we know, you know, what the current Board's position is on any one of these questions of policy. Agreed, it is as you gentlemen say it was, as you gentlemen say; but is it still that way today?

MR. MCDONALD: I might add, Your Honor, if Your Honor is impressed by the question or concerned about the question of the present Board's status, I would respectfully ask them rather than decide this case on a motion to dismiss that the evidence be taken and an opportunity for briefs be allowed for the parties to develop that point in much more detail. And, furthermore, what is the effect on the Board if a denial in the First Circuit of, let's say a denial in the First Circuit

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or the Fifth Circuit?

JUDGE FITZPATRICK: I am really just asking questions to try and get out collective knowledge out as to what the status of the law is today. It is difficult for the public where one aspect of the government is taking one tack, and another arm is taking another tack; which according to you is the situationhere.

You are urging me, I assume, you are urging me that I am bound by the particular tack taken by by arm of the government, the Labor Board. I don't doubt it, I am just trying to tie down as nearly as I can in technical terms what the state of Board Law is on the matter.

I am taking you gentlemen at your word as to what the status of the Board Law is, since I am not that much up on it,

frankly. I think I am bound by Board Law, and irrespective that circuits may have gone the other way.

I further note, that as Mr. McDonough pointed out, the circuit in which this particular matter arises has not spoken. In the circumstances, I think the Board itself would overrule me if I were to grant the motion to dismiss. Accordingly, I deny the motion, as I think I am bound by Board Law.

MR. COVEN: At this point, Your Honor, it is 20 of 1, I have two witnesses who will be brief witnesses, one of whom is going to be my first witness, and is available on a telephone call. May I suggest we recess at this point for lunch;

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come back in about an hour; and I will have my witnesses prepared to go at that point?

JUDGE FITZPATRICK: All right.

We will be in recess for one hour.

(Whereupon, at 12:45 p.m., the hearing in the above-entitled matter was recessed, to reconvene at 1:45 p.m., the same day in the same place.)

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AFTERNOON SESSION

1:45p.m

JUDGE FITZPATRICK: The hearing will be in order.

MR. COVEN: Mr. Reardon, please.

Whereupon,

THOMAS M. REARDON

was called upon as a witness, by and on behalf of the Respondent, and having been first duly sworn, was examined and testified as follows:

JUDGE FITZPATRICK: Be seated and give your name and address to the Reporter.

THE WITNESS: My name is Thomas M. Reardon, I am with the Law Firm of Warner & Stackpole, 28 State Street, Boston; and my home address is 134 Morse Road, Sudbury, Mass.

DIRECT EXAMINATION

Q. (By Mr. Coven) Mr. Reardon, you have identified yourself as a member of the law firm of Warner & Stackpole, is that correct?

A. That's correct.

Q. You are an attorney admitted to practice inthe State of Massachusetts?

A. Yes, I am.

Q. There has been some testimony that you and Mr. Walsh represented the Employer's Group in these negotiations with Teamsters Local 25 in the last negotiations for collective

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bargaining agreement, is that correct?

A. That's correct.

Q. And by stipulation, the parties have agreed that those negotiations started on March 14th or the first meeting was held on March 14 of 1975, and the last meeting was on April 13th of 1976; at which time final agreement was reached on the contract. Is that correct, sir?

A. That's correct.

Q. And you and Mr. Walsh represented the Employer's Group at all those meetings?

A. That's correct.

Q. Now, referring to the first meeting after Mr. Bonanno's withdrawal—withdraw that.

You are familiar with the—with Mr. Bonanno's withdrawal or the Bonanno Linen Service Company withdrawal from the Employer's Group which took place on or about November 25 of 1975?

A. Yes, I am.
Q. And when was the—withdrawl that.

And you are familiar with the fact that a letter dated November 24th, 1975, a copy of which I show you and which is marked Joint Exhibit 5 attached to the stipulation; Mr. Walsh offered to me an attempt to settle the terms of the contract, is that correct? That is after Mr. Bonanno's withdrawal?

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A. Right on behalf of the member committee's remaining or companies.
Q. And of course the letter speaks for itself, your Honro, I won't attempt to go into the letter.

Now, when was the first meeting held after that November 24, 1975, letter?
A. It was on December 1, 1975, the 19th meeting.
Q. Was there any discussion at that meeting with respect to the fact that Bonanno had withdrawn from theEmployer's Group?
A. Mr. McCarthy indicated to those present that the Union had received our letter of November 24th I believe the date was, the letter you just showed me?
Q. Yes.
A. And indicated that the letter had said Bonanno had withdrawn from the group and also mentioned as I recall that the rest of the Company's had brought their men back from lockout.

Mr. McCarthy then stated or asked Mr. Walsh who, as you mentioned, representing the Employer's Group from our side, who had replaced Mr. Bonanno in the negotiating committee; and Mr. Walsh replied Alan Shapiro. And, then, Mr. McCarthy asked when we were willing to meet with them when our committee was willing to meet with them and Mr. Walsh indicated, as we had in the past, that he, myself and Mr. Rayner would

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continue to meet and represent the member companies who were left.

Q. And, at that meeting, did the Employer's Group change its position in any way from the position it had taken in the last prior meeting?

A. No, we did not.

Q. When was the next meeting held?

A. The next meeting, the 20th, was held on February 4, 1976.

Q. And, again, was there any discussion about Bonanno at that meeting?

A. There was no discussion of Bonanno at that meeting.

Q. Did the Company's change their position in any way at that meeting?

A. No, they did not.

Q. When was the following meeting?

A. the following meeting was on April 5th, 1976, the 21st meeting.

Q. Was there any discussion about Bonanno at that time?

A. No, there was not.

Q. Did the Company change their position in any way?

A. Yes. The companies on April 5th, made a substantial change in proposal with respect to rates, and the like.

Q. Now, was there any agreement reached on April 5th?

A. No, there was not.

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Q. When was the following meeting?

A. ON April 13th, 1976, the 22nd and final meeting.

Q. Was there any discussion concerning Bonanno at that time?

A. Yes, there was.

We had some discussions specifically relating to the litigation that was pending at that time. There was an antitrust suit which had been filed by Local 25, and there was a temporary—injunction suit filed by the companies as well as some workmen's comp cases that had been filed.

The discussion—and let me refer to my notes, if it would be more helpful—I will.

First of all, the Union had indicated to Commissioner McDermott prior to the meeting that they were willing to withdraw their demands for commissions and they were willing to talk about an offer which was on a rate basis.

Q. Commissioner McDermott being who?

A. Commissioner McDermott being a representative from the Federal Mediations and Conciliation Service.

So, when Mr. Salter came in, he was asked by Commissioner McDermott if in fact commissions were still in issue, and Mr. Salter responded it is our intention with a counter proposal that the commission issue is dead. If we have agreement we have a contract.

Then Mr. Walsh said, what about the pending litigation?

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Mr. Salter responded we would probably wash all the pending litigation—this does not include Bonanno, they are separate now and not in the group. Mr. Walsh responded, I understand; because we no longer represent Bonanno. Warner & Stackpole Does represent Bonanno in the antitrust and their injunction suit. Incidently, that is incorrect. We no longer represent them in that suit, because Lepie & Coven made an appearance at that point. Mr. Walsh went ahead and said, however anything we do here doesn't relate to Bonanno. There are two pieces of litigation, one involves the injunction and the other involves antitrust; we have filed a motion to dismiss in the antitrust case; and unemployment cases we are

only involved incidently. The Board of REview is involved now, whether we are in it or not.

Companies unemployment accounts will be charged, the State will pursue the action in any event. Mr. Lyden responded at that time understood you have no control over—insofar as the Board of REview will pursue it. Mr. Lyden was also present for the Union at that time. I believe he is vicePresident of Local 25.

MR. COVEN: I have no further questions.

MR. MCDONOUGH: One minute.

CROSS EXAMINATION

Q. (By Mr. McDonough) Mr. Reardon, I believe you testified at the last meeting, the 22nd meeting, you read it rather

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rapidly, but there was talk about, some talk at the last meeting about the antitrust suit, temporary restraining order, pending workmen's compensation, pending, these are three different pieces of litigation? They were pending at the time?

A. Unemployment comp cases, not workmen's comp.

Q. Okay.

And all of that litigation you said—did that involve the whole group or just Bonanno or who?

A. The antitrust suit was filed by Local 25, it was filed against the whole group as I recall. We represented everybody in that suit. It was filed, as I recall, before Bonanno withdrew from the group. The temporary restraining order and the injunction suit; we represented the whole group up to the point when Mr. Bonanno withdrew. Because we filed it before he withdrew.

I believe on December 1, I am not sure, or shortly before then, Lepie & Coven entered an appearance. In any event, they did enter an appearance at some point in time, and that

is why I say, I don't know whether this is correct in saying that we represented Bonanno in that suit.

In the unemployment comp cases, it involved all the individuals who had filed for unemployment compensation, and I forget how many, there may have been 70 cases or so. And they were consolidated and Warner & Stackpole represented the

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entire group on that. Again, those cases were before Bonanno had left I believe.

Q. But this is all litigation regarding the group that didn't have direct impact on the contract negotiations, is that true? In other words—prior litigation, not directly involved?

A. Collateral litigation.

Q. And as part of the consideration for the contract, all of these matters were withdrawn, is that what you said?

A. Not as part of the consideration of the contract, we were very concerned as to—Mr. Walsh and myself, that this not be put up as part of the considerations. We simply asked the question what about the litigation.

At that point in time Mr. Salter responded, as I have stated, that he expected the litigation to be washed out.

Q. All right.

Now, did I understand you correctly when you said that Mr. Walsh said anything that we do here does not involve Bonanno?

A. That's correct. Does not relate to Bonanno, right.

Q. What was meant by that, when you say anything we do here, you were discussing collateral litigation?

A. We were discussing collateral litigation; but if you recall the conversation began with a discussion of commissions and whether we could settle this contract. So it meant not

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only the contract issues with respect to what our Group is going to do, but also the collateral litigation in which Warner & Stackpole and the Group was involved.

Q. That was said by Mr. Walsh?

A. That's right.

Q. Who is a member of your firm?

A. That's correct.

Q. Who is also representing the Employer's Group?

A. That's correct. He was the senior spokesmen for the group, let's say.

Q. All right.

Thank you.

Q. (By Mr. McDonald) May I see the notes that you used for purposes of examination?

A. Certainly if you can read my writing.

MR. MCDONALD: May I have just one minute, Your Honor.

JUDGE FITZPATRICK: Yes.

(Pause.)

Q. (By Mr. McDonald) Mr. REardon, as I review your notes it appears to me this statement you have attributed to Mr. Salter with respect to the inclusion of Bonanno was in response to a question by Mr. Walsh, "what about pending litigation?", is that correct?

A. I believe that is correct; yes.

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Q. So that when you stated Mr. Salter said, Mr. Bonanno is separate. Mr. Salter was referring to the resolution of the litigation that was pending—

MR. COVEN: I object.

Litigation speaks for itself.

JUDGE FITZPATRICK: He is not just talking about his notes. He is talking about his testimony as to what happened at the event. He can inquire about it.

Overruled.

MR. COVEN: Object to the form of the question. He is asking for his conclusion as to what Mr. Salter meant. I think YOur Honor should make that determination, not Mr. Reardon.

MR. MCDONALD: Withdraw the question.

Q. (By Mr. McDonald) Mr. Reardon, Mr. Salter's statement if your recollection is consistent with the notes, is it not, was in specific response to a question by Mr. WAlsh with respect to pending litigation?

A. That's correct.

Q. And you are aware that Mr. Bonanno is represented by separate counsel, is that correct?

A. At the present time, yes.

Q. And you were also aware at the time, were you not, that Local 25 had filed a charge in this case against Bonanno?

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A. No, I was not, as a matter of fact. As I recall it was filed on a Friday, and I forgotten what date this was, but I didn't hear about this until afterwards.

Q. Moving back to your testimony, with respect to the first meeting after Bonanno's withdrawal, you indicated there had been no change in the position. Isn't it true that prior to Bonanno—shortly before Bonannos' withdrawal there had been considerable discussion with respect to a change in this bargaining strategy by members of the Employer's Group—

MR. COVEN: I object to any questions about what was taking place before the meeting. The question is: what did the Employer's Group take, not what discussions preceded their position or their statement of position.

JUDGE FITZPATRICK: Are you arguing that it is beyond the scope of direct?

MR. COVEN: That, among other things.

First on the question of materiality—it goes beyond the scope of direct. And, second, that it is irrelevant in that it doesn't matter what discussions the parties—the various members of the Employer's Group had among themselves before the meetings. The question is what position did they take at the meeting.

JUDGE FITZPATRICK: I sustain the objection, only on the grounds that it is beyond the scope of direct.

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Do you wish to be heard?

MR. MCDONALD: Yes, Your Honor, I do.

It appears to me that counsel has offered the testimony for a number of reasons, one of which to presumably rebutt the testimony that was offered through my witness this morning, a change in strategy had presumed to have been agreed upon. The testimony was that no change in fact occured; therefore I don't think it is beyond the scope of the direct examination, to that extent, Your Honor.

I think I am entitled to inquire since the evidence is being offered and certainly will be argued to rebutt in the inferences that was present in the testimony I offered; I should be allowed to inquire in these areas, since this is the first meeting after the purported withdrawal.

JUDGE FITZPATRICK: I don't understand the direct testimony of the witness to relate to the point you were making this morning.

MR. MCDONALD: The testimony was, Your Honor, that there was no change in the Employer's Group position. Counsel will argue that this rebutts any inference that the

testimony this morning may have raised, that in fact a change was contemplated and caused the withdrawal of Bonanno.

JUDGE FITZPATRICK: I will reverse my ruling—

MR. COVEN: Excuse me, may I be heard?

The question we heard argued this morning was not

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whether or not the parties had discussed a change in policy or whether this in fact caused Bonanno's withdrawal. The question was with respect to Mr. McDonald's position that the impasse had been broken. And, that is the only question—the only issue which you, Your Honor, allowed the testimony. Only with respect to his intention that the impasse had been broken on prior to or about November 21st and this question doesn't go to it at all. In fact, the testimony shows clearly that the impasse had not been broken, and wasn't broken until April the 13th.

JUDGE FITZPATRICK: I adhere by my latest ruling, and I will allow the question.

Q. (By Mr. McDonald) Directing your attention to this discussion amongst the Employer's Group prior to the purported withdrawal of Bonanno, which as I understand it, I understand there were no meetings between those discussions and the December 1st meeting.

Directing your attention to the period before November 21st, isn't it true that members of the Employer's Group were discussing a change in the strategy that they had employed prior to that time?

A. Mr. McDonald, I am afraid you have got me in a bind here. I don't know what the ethical rules are in connection with this kind of testimony; but it seems to me that without the release or without the acquiesence of our clients, I

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can't testify as to this testimony since it was directly within the attorney-client privilege as far as I am concerned. I hadn't anticipated your question, and so I didn't try to get any kind of authorization. I would be glad to do so, but until I do I can't see answering the question.

MR. MCDONALD: It would seem to me, Your Honor, that the privilege has been waived by the witness coming forth and testifying to the extent he has.

JUDGE FITZPATRICK: It seems to me it has been too.

It has certainly been waived by Bonanno, if you recall you testified you were dealing with the bargaining situation. You have been called to testify with respect to your participation in the bargaining issue here.

It does not directly relate to any liability on the part of any members other than Bonanno; so I cannot see how it would prejudice your other clients in that regard. Accordingly I think there isn't any issue of privilege at this point at least.

Now, you will have to do what your conscience—

MR. COVEN: Your Honor, if I may be heard for one moment.

JUDGE FITZPATRICK: Just a minute, let me finish my instruction to the witness.

I think you are to do what your conscience dictates, but my instruction would be for you to answer the question.

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Mr. Coven?

MR. COVEN: If I may be heard for one moment, Your Honor.

As far as the privilege being waived by Mr. reardon appearing here and Bonanno calling him, we didn't call him and we

didn't ask him any questions at all, and he didn't offer any testimony as to any discussion that went on within the group. These confidential discussions within the group—

JUDGE FITZPATRICK: You asked if the position had changed.

MR. COVEN: Only the position which was took at the meeting. It was no longer confidential, not at the bargaining meetings. We asked him about the bargaining meetings. We didn't ask about any discussions within the group. It has been our position consistently, of course, that any discussions within the bargaining group were irrelevant, and were not material to this proceeding. So, we didn't ask him that, and may I respectfully urge that either—neither Mr. Reardon or Mr. Bonanno waived that attorney-client privilege with respect to these confidential discussions within the framework of the Employer's Group.

JUDGE FITZPATRICK: Thank you.

I will adhere to my ruling.

THE WITNESS: I wanted to make two comments. The first has already been stated by Mr. Coven. And, the second is I disagree with you, Your Honor, with respect to the

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question of whether or not there could be prejudice.

In a hypothetical situation, not this situation let me make that clear, there could be any kind of an unfair labor practice charge eminating from what kind of internal discussions were had. And, so, I am afraid I must respectfully decline to answer without authorization.

JUDGE FITZPATRICK: Counsel can carry it from there.

Q. (By mr. McDonald) It is my understanding then you are refusing to answer any questions with respect to conversations concerning Employer Group strategy that occured prior to the November 21st, 1975—

A. Or after for that matter, yes.

MR. MCDONALD: Your Honor, in view of the witness's testimony, I would request a brief recess to allow him the opportunity to obtain a waiver from his client for purposes of offering testimony rather than having to move to strike testimony.

Again, I think we should allow him that courtesy, as it is my understanding if he did get a waiver he would testify.

THE WITNESS: That's right.

JUDGE FITZPATRICK: What sort of a recess are you suggesting?

MR. MCDONALD: I would simply offer him an opportunity to mke a phone call to the director of the Employer's Group to ascertain whether or not in fact a waiver would be available.

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JUDGE FITZPATRICK: I understand, but how much time are you asking?

MR. MCDONALD: Five minutes, to ten minutes?

JUDGE FITZPATRICK: We will be in recess for ten minutes.

(A short recess was taken.)

JUDGE FITZPATRICK: The hearing will be in order.

THE WITNESS: Your Honor, if I can report back to you, I have talked to the individuals concerned, three of them gave me their permission to speak, but the fourth one denied permission pending a conference, a telephone conference with his president, Richard Senior, in Chicago. He thinks he can get back to me this afternoon, but I am not sure, or he is not sure. And, until I get that, I am afraid I will have to decline.

JUDGE FITZPATRICK: What is your suggestion, Mr. McDonald?

MR. MCDONALD: I will not move to strike the testimony of this witness; but I would simply ask if in fact the position remains the same that the reasonable inferences be drawn from the refusal to answer the questions. I would be willing to proceed with the hearing, proceed with the other witnesses. And, if counsel hears from his principal prior to the close of this hearing, then to bring him back if he will consent to answer the questions, examine him at that time.

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MR. COVEN: Your Honor, I may say this, this is going to be my only witness. I thought I would have to call another witness, but in light of what was illicited from General Counsel and the Union's witnesses, I find it unnecessary to call the other witness. So, Mr. Reardon will be my only witness.

JUDGE FITZPATRICK: Mr. Reardon, how long do you think it would be before you hear?

THE WITNESS: It all depends on whether the chief man, the president is available; and this individual was going to call immediately and see if he could get ahold of him, and get back to me as soon as he could. He expected to get back before the afternoon was through.

JUDGE FITZPATRICK: What does that mean? Are you talking about 5 o'clock?

THE WITNESS: I would hope so, but I can't give you any guarantees.

JUDGE FITZPATRICK: My feeling is we should continue with our examination of this witness to the extent that we can, and if we have not then heard, if he hasn't then heard; I will grant a short recess. But, in any event, it doesn't seem to be a matter that I should grant a lengthy recess about.

I think my idea would be, I would simply take the record as is, and draw such appropriate inferences as I think

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are warranted, based upon the record as made, and wind the hearing up.

MR. MCDONALD: Thank you, Your Honor.

I have no further questions of this witness.

JUDGE FITZPATRICK: Do you have any further questions?

MR. MCDONOUGH: I have no further questions.

JUDGE FITZPATRICK: Mr. Coven?

MR. COVEN: I have one or two further questions.

REDIRECT EXAMINATION

Q. (By Mr. Coven) I looked at your notes a little while ago, and your notes indicate whether or not you and Mr. Walsh or other members of your committee have any conversations with Commissioner McDermott, Federal Commissioner McDermott before you had a general session with the Union representatives, Mr. Salter and Mr. Lyden?

A. This is on the April 13th the last meeting?

Q. Yes.

A. Yes, they do.

Q. Can you tell us what that conversation was you had with Commissioner McDermott at that time?

MR. MCDONALD: I would object to at this point, to any conversation between this witness and Commissioner McDermott as Commissioner McDermott is not present in the room and not available for cross examination on the issue involved.

JUDGE FITZPATRICK: Who is Mr. McDermott?

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MR. COVEN: He is the Federal Mediator.

JUDGE FITZPATRICK: Objection overruled.

THE WITNESS: Well, as background on the previous

meeting on April 5th, we made a proposal, the Company's made a proposal to the Union, and the sum and substance of this was, the Union's response was that they would have to study it. During the course of the week, before the last meeting, the 22nd meeting on April 13th, the Union got back to Commissioner McDermott directly. We had written up our proposal in a 20 page document or so; and they had gotten back to Commissioner McDermott with several changes on that document, which was in effect their counter proposal.

Just prior to the meeting with the Union, while we were all there, but Commissioner McDermott was with us separately, Commissioner McDermott stated, what do you think of the Union's counter proposal? And Mr. Walsh responded, we want to know if commissions are out? McDermott: Let me raise that with them. Walsh: what about litigation? Anything said what happens to it? McDermott: Said nothing yet. Walsh: We of course can't speak for Bonanno, on language there is a lot of give, transfers—that refers to a provision with respect to transfer in both our proposals—as the last statement.

MR. COVEN: I have no further questions.

JUDGE FITZPATRICK: What was the date of this?

THE WITNESS: April 13, 1976.

JUDGE FITZPATRICK: These notes you have been referring to, when did you make the notes?

THE WITNESS: When did I make the notes?

JUDGE FITZPATRICK: When?

THE WITNESS: At the time of the meeting.

JUDGE FITZPATRICK: What function did you perform at that meeting?

THE WITNESS: Mr. Walsh, he was the principal spokesmen for the group, for the negotiating committee; and I in effect was the scribe. I transcribed minutes of the meetings, which I have for the entire 22 meetings.

JUDGE FITZPATRICK: So there was a management committee and a union committee, correct?

THE WITNESS: Yes.

JUDGE FITZPATRICK: Do you know whether there was similar notes made by your counterpart, across the table?

THE WITNESS: I am not sure if there were at that meeting. I think there probably were from time to time.

JUDGE FITZPATRICK: You mentioned McCarthy, who is McCarthy?

THE WITNESS: Mr. McCarthy is, I believe, the president of Local 25. He was a representative along with Mr. Salter for a number of meetings. The Union committee changed from time to time. In the beginning the first 10 or 12 meetings

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or so Mr. Salter was the principal Union representative, along with three individuals from the various company, drivers; and they were staggered. One would come in with Mr. Salter one day and then the next another day.

Then, at a later point in time with the Federal Mediation Conciliation Service got involved, I believe, a man by the name of Johnson, Ken Johnson accompanied Mr. Salter. And, then Mr. Johnson, as I recall was taken ill and Mr. McCarthy and Mr. Salter negotiated for several meetings; and then the last meetings and I think maybe the last two meetings Mr. Lyden who is the vice president of Local 25 and Mr. Salter were the Union representatives.

JUDGE FITZPATRICK: What is McCarthy's first name?

THE WITNESS: William.

JUDGE FITZPATRICK: Acting as a scribe, were you acting only for your clients or also for other negotiators in the room?

THE WITNESS: You mean negotiators for the Union?

JUDGE FITZPATRICK: Yes.

THE WITNESS: No, I was acting only on behalf of the Company.

JUDGE FITZPATRICK: Any more questions of this witness, Mr. Coven?

MR. COVEN: No, YOur Honor.

JUDGE FITZPATRICK: Mr. McDonough?

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MR. MCDONOUGH: No, I don't, I defer to Mr. McDonald.

RECROSS EXAMINATION

Q. (By Mr. McDonald) A point of clarification, when Mr. McDermott made these statements that you referred to, were you separated?

A. Yes.

Q. That is to say, you or he was with the management committee?

A. Yes.

Q. And there were no union representatives present?

A. That's right.

MR. COVEN: May I?

FURTHER REDIRECT EXAMINATION

Q. (By Mr. Coven) After your completion of discussions with Mr. McDermott that you just testified, was there a joint session with the management and representatives of the Union?

A. That's correct.

Q. And Mr. McDermott was also present?

A. That's correct.

Q. It was during that joint session that Mr. Salter testified, as you testified earlier, to the effect that this does not include Bonanno, they are separate and not in the group?

A. That's correct.

MR. COVEN: I have no further questions.

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JUDGE FITZPATRICK: Any further questions?

MR. MCDONOUGH: I have nothing further.

MR. MCDONALD: Nothing further.

I do have two rebuttal witnesses I will be calling. I am prepared to go forward with those, if its acceptable to you?

JUDGE FITZPATRICK: Can you remain available?

THE WITNESS: Yes, Your Honor.

JUDGE FITZPATRICK: All right, fine.

I think we will move on then to the Union's witnesses. Please step down, thank you.

(Witness excused.)

JUDGE FITZPATRICK: You have no further witnesses to call?

MR. COVEN: No, sir.

JUDGE FITZPATRICK: Does General Counsel have any rebuttal?

MR. MCDONOUGH: General Counsel has no rebuttal.

MR. MCDONALD: I would like to call Mr. Salter. Whereupon,

HERBERT T. SALTER

was recalled as a witness, by and on behalf of the Charging Party and, having been previously sworn, was examined further and testified as follows:

JUDGE FITZPATRICK: Proceed.

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DIRECT EXAMINATION

Q. (By Mr. McDonald) Mr. Salter, there has been some testimony today with respect to a conversation between yourself and Louis Katz last Friday with respect to a change in

bargaining strategy prior to attempted withdrawal of Bonanno. WEre you in the courtroom this morning when the testimony was given by Mr. Katz?

A. Yes, I was.

Q. Could you explain, please, to the best of your recollection the substance of that conversation?

MR. COVEN: I object. It is apparently, he is apparently trying to impeach the testimony of his own witness.

Mr. Katz was his witness. Mr. Katz testified as to certain conversations he had with Mr. Salter; and he also testified as to certain conversations that he had with Mr. Bonanno. Now, what conversations he had with Mr. Salter or his testimony, or Mr. McDonald is stuck with Katz's testimony as to what he told Salter. And, if Salter is going to try to change that testimony, Mr. McDonald is attempting to impeach the testimony of his own witness, or the credibility of his own witness.

I object to any testimony by Mr. Salter to any conversations he had with Mr. Katz. Mr. Katz is not a party to this case, his testimony is not binding on the Respondent here. The only purpose of this testimony is to impeach his witness.

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He is Mr. McDonald's witness.

JUDGE FITZPATRICK: Counsel?

MR. MCDONALD: First of all I don't think there is any rationale for concluding we are trying to impeach anyone's testimony, because the witness hasn't testified yet.

The witness will in my mind corroborate the testimony of the other witness, and fill in gaps where the gaps are missing in the other witness's testimony, in the interest of building a full and fair record upon which the decision of this case can rest.

JUDGE FITZPATRICK: Is that—if that is your purpose—

MR. MCDONALD: It is also, Your Honor, there was testimony given with respect to change or failure to change in a position by the Respondent in this case on his direct case; and I feel I have an opportunity again to rebutt that, as I attempted to do with Mr. Reardon to bring in any evidence I may have with respect to the shift in the position.

JUDGE FITZPATRICK: Now that is another point.

What were you going to say, Counsel?

MR. COVEN: I was going to say that any testimony as to the conversation between Katz and Salter is not admissible evidence as to any so-called changes in the position.

Now if Katz told Salter something strictly between Katz and Salter. I don't know what Katz said, and Katz might have told him any number of things. But, that is if he testifies that Katz said something or other, that is hearsay.

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Because that is not direct testimony as to what happened or what Bonanno said or what members of the committee said. If that is the purpose, this is not admissible evidence or proper evidence of any so-calld change of position or discussions of change of position.

JUDGE FITZPATRICK: You are raising afurther objection based on hearsay?

MR. COVEN: Yes, sir.

JUDGE FITZPATRICK: I think it is well taken. I think the prior objection is well taken. I will sustain the objection on that grounds.

I am not excluding you from examining the witness on any matter that is proper rebuttal; but I don't see the conversations last Friday, his conversation as dealing with that frankly. If there was evidence that this witness could give that is admissible testimony that bears on the issues involved; it

would have been proper at the earlier stage of this proceeding. It wouldn't be proper now unless you can show me it is proper rebuttal somehow or other, and something that shouldn't have been brought up before.

MR. MCDONALD: I would think it is proper rebuttal, Your Honor, because for the first time in his direct examination counsel has raised the issue of change in an effort to rebutt our direct case, in that we had suggested there was an eminent change. He has prooferred evidence, or at least an intent to

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change; he has shown no there was no change in the inference that arises is that there was therefore no intent to change. I think since that was raised by the Respondent, I have then the right to go into it again in the rebuttal case.

JUDGE FITZPATRICK: Again, you said?

MR. MCDONALD: Further, more fully.

JUDGE FITZPATRICK: I am not keeping you from going into any rebuttal. I don't want to retry matters that are already tried, that is all.

MR. MCDONALD: Is it my undersatnding you are not allowing me to inquire about the conversation with Mr. Katz sofar as it bears—

JUDGE FITZPATRICK: Ask a question. I cannot see whereby it can possibly relate to anything that you didn't already have an opportunity to go into in your case in chief.

Q. (By Mr. McDonald) My question to Mr. SAlter would be to relate his conversation he had with Mr. Katz on last Friday?

MR. COVEN: And, I objected to that.

JUDGE FITZPATRICK: I will sustain the objection.

MR. MCDONALD: I have no further questions.

MR. COVEN: I have no further questions.

JUDGE FITZPATRICK: Thank you, you may step down.

(Witness excused.)

JUDGE FITZPATRICK: Anything else?

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Whereupon,

ARTHUR SPILIOS

was called as a witness, by and on behalf of the Charging Party, and having been first duly sworn, was examined and testified as follows:

JUDGE FITZPATRICK: Please be seated and give your name and address to the Reporter and spell your last name.

THE WITNESS: My name is Arthur Spilios, S-p-i-l-i-os, I live at 3 Doppingbrook Road, Sherburn, Massachusetts.

DIRECT EXAMINATION

Q. (By Mr. McDonald) Mr. Spilios, you are here as a result of a subpoena issued by the National Labor Relations Board at my request?

A. Yes, I am.

Q. You were not here when the hearing commenced this morning, but arrived at some subsequent time?

A. I was here before the meeting started.

Q. You were here before the meeting started?

A. I was told the meeting hadn't started yet when I walked in the door.

Q. What time did you get here?

A. Quarter of 12, I am not sure.

Q. What is your occupation, Mr. spilios?

A. I am president of Royal Crown Linen Service.

Q. That is one of the Linen Company's in the Employer's

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Group that is the subject of this hearing?

A. That's correct.

Q. And in your capacity as president, are you responsible for labor relations with the Company?

A. That is correct.

Q. And have you participated in those collective bargaining decisions that the Company has made with respect to Local 25 in the course of the past year or so?
A. That is correct.
Q. And you are aware that on or about November 21st, of 1975, the Bonanno Company attempted to withdraw and sent notifications of a withdrawal to the Employer's Group?
A. I am not sure about the date, but it was in November; yes.
Q. Do you recall that it was shortly before Thanksgiving?
A. Yes.
Q. And at the time that this happened, your company had locked out the employees represented by Local 25, is that correct?
A. At the time this had happened?
Q. Yes.
A. Prior to that we were locked out.
Q. From June until—
A. Un-huh.
Q. —sometime in November, November 25th or 26th?

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A. That's right.
Q. And there were negotiationsongoing between the Employer's Group and Local 25 during that same period?
A. That's correct.
Q. And shortly before Mr.—the Bonanno Company purportedly withdrew, could you tell us what change in strategy if any was discussed by the Employer Group?
MR. COVEN: I object.
JUDGE FITZPATRICK: Overruled.
You may answer.
THE WITNESS: Our basic strategy, I have to talk about

the basic strategy as I remember it from the time the negotiations started was to resist the commission and be moderate in our hourly rate offers. And that was our basic strategy.

Just before Bonanno withdrew, as I remember, we had a credibility problem in the group because two of the Company's had met with the Union secretly and there was some discussion at, I think the last meeting, even maybe the meeting prior to that. That maybe we should offer a sky high offer in money to try to settle the strike.

Q. (By Mr. McDonald) As opposed to the commission?

A. As opposed to the moderate offers here we had been giving, and as opposed to commission.

Q. Did Mr. Bonanno oppose that strategy?

A. It wasn't a strategy. These were certain members of the group were starting to talk about—along the lines of

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sky high offers and this was getting away from our original strategy, which was to give moderate fair increases in money; because Mr. McCarthy made it very clear to us that it had to be commission and nothing but commission would solve—would settle the strike.

Q. So your testimony that whatever you want to call it, concept, strategy, whatever; Mr. Bonanno opposed this new concept of a sky high wage offer?

A. I don't remember him opposing it—I don't remember what he said, but it was just—including myself—I felt that we were getting way away from the strategy and the next thing I knew it Bonanno had resigned.

Q. Is it your testimony that the resignation that—that the resignation was due to the talk of the sky high increase—

MR. COVEN: I object to his characterization of what the witness's testimony is. I think the witness' testimony speaks

for itself; and I object to Mr. McDonald's characterizing it, or to speculate on what caused Mr. Bonanno's withdrawal.

JUDGE FITZPATRICK: Overruled.

I don't look on it as characterization. I think counsel is simply trying to explore what actually happened in there.

You may answer.

MR. COVEN: He is asking him what his understanding of the reason is for Bonanno's withdrawal.

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JUDGE FITZPATRICK: It is subject to cross examination.

Q. (By Mr. McDonald) Do you recall during this n-on hour your telling me that that was the reason for Bonannos'—

MR. COVEN: I object.

What he told Mr. McDonald at noon time or any other time. That is hearsay or certainly a conversation held out of the context of the Respondent, and in no way binding on the Respondent.

JUDGE FITZPATRICK: Overruled.

THE WITNESS: What I told you is what I told you in the back of the room about ten minutes ago; that it was of my opinion that we had gotten off the line of the original strategy and that was to resist commission and be moderate in our wage increases or our offers; because the Union made it very clear that any offers in the way of hourly rate wouldn't mean anything that they had to have a commission settlement.

And, at the time of—in November, in that area of time, there was discussion by certain members of the Committee that maybe a good sky high offer would settle the strike.

Q. (By Mr. McDonald) Mr. Bonanno opposed this strategy?

A. It wasn't a strategy, it was a discusion. We hadn't agreed to do it.

JUDGE FITZPATRICK: What position did Bonanno take?

THE WITNESS: He was against it.

Q. (By Mr. McDonald) Shortly thereafter he withdrew?
A. It could have been right there at the time, I am not

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sure of the exact time. I think there were two meetings or three meetings all within three or four days.
Q. And the withdrawal, based on the intended circumstances would do to this new concept discussion about the high wage offer—

MR. COVEN: I object.

Again he is asking the witness to speculate.

JUDGE FITZPATRICK: Just a second, I will sustain the objection. I think it is leading the witness.

MR. MCDONALD: I have no further questions.

MR. MCDONOUGH: I have no questions.

CROSS EXAMINATION

Q. (By Mr. Coven) Mr. Spilios, you said that before Mr. Bonanno withdrew, there was a credibility problem because two companies had separate meetings with the Union?
A. That's right.
Q. And what were those two companies?
A. Morgan Linen and—Morgan Services, and Mr. Katz's company, Standard Services.
Q. And was there some discussion about the fact that Morgan and Standard had had these separate meetings with the Union?
A. Yes.
Q. Was there an attempt by Mr. Bonanno to get an assurance that this would not happen again in the future?
A. That's right.
Q. Did he get such an assurance?

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A. Yes.
Q. Did he get it from everybody in the group?
A. As far as I know he did; yes.
Q. This discussion about this so-called, about the advisibility of making a sky high offer, was Mr. Bonanno the only one who opposed making that sky high offer?
A. No.
Q. Did various other members of the group speak up against it?
A. Well, it was discussion you see. It was suggested. I don't know who suggested it, but it was discussion and things were bandied about. The thing that concerned—I can speak for myself, I don't know what was going on in Bonanno's mind, was the credibility and then all of a sudden these discusions coming up. And, the discussions getting away from the initial strategy that in my mind it was a fear that the strategy that certain members of the committee might change the strategy.
Q. In other words, that certain members of the committee might go off and make a separate deal with Local 25?
A. That's right, we just didn't know—
MR. MCDONALD: Objection.
That is not what the witness said, and counsel is putting words in his mouth.
JUDGE FITZPATRICK: Just a second, have you finished?
MR. MCDONALD: I believe the witness—the testimony

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will show that the fear was that other members would adopt other strategy of the offers—
JUDGE FITZPATRICK: Just a second, I am listening to counsel.

Now, continue.

MR. MCDONALD: And it appeared to me that the following question that was asked by Counsel dealt with another aspect and that was the meetings that were held separately away from the bargaining table.

MR. COVEN: That was proper—

JUDGE FITZPATRICK: Just a second, counsel.

Objection overruled.

Q. (By Mr. Coven) What was your answer, Mr. Spilios?

JUDGE FITZPATRICK: He gave his answer.

Q. (By Mr. Coven) In the course of this discussion about the possibility of this or the feasibility of making a so-called sky high offer, approximately how many members of the group indicated support and how many indicated opposition to such a proposal?

A. Once again it was discussions. Discussions as you are sitting around people, that credibility problem. People were discussing things; and even the people that may have discussed I don't know if they really wanted to do it or not. It was just the fact that it was brought up, was something to worry about, because it was breaking a line of what the initial

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strategy had been all along.

There was no sign from the Union that there was going to be a break in the commission, none whatsoever. And, we felt as a group that to give a substantial money offer to try to get the Union to talk away from commission was futile. That the Union had made it very clear to us that no matter what you offer we want commissions. So the group felt we would be building up a base, and we would be hurting ourselves if we gave a sky high offer and then all of a sudden sky high offers were mentioned at that particular time.

So, as I remember it, at that time Bonanno resigned—
Q. Bonanno resigned after these discussions, is that correct?
A. That's right.
Q. He wasn't the only one who indicated that he was opposed to making the sky high offer?
A. No, he wasn't.
Q. You yourself indicated you were opposed?
A. That's right.
Q. Did the group at that time make any change with respect to its offer or vote any change with respect to its offer?
A. As I remember when Bonanno resigned, of course that just changed the complexion of everything and I don't think anything got settled in that meeting. And the lockout was lifted soon after that; and we just went on. I don't think

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anything happened, we just went on.
Q. Well, before Bonanno resigned, there had been no vote or any agreement as to change in your offer to the Union, is that correct?
A. That's right.
Q. Did Bonanno ever tell you himself the reasons for his withdrawal?
A. Away from the group?
Q. Either away from the group or within the group?
A. I can't remember anything specific that he ever told me that the group hadn't heard.
Q. So that your testimony or whatever testimony may be on the record with respect to the reasons for the—or the purported reasons for Bonanno's withdrawal are only your speculation, is that correct?
A. That's right.

MR. COVEN: I have no further questions.

JUDGE FITZPATRICK: Any redirect?

MR. COVEN: Oh, I'm sorry, just one more.

Q. (By Mr. Coven) Were you present in the meeting of April 13th, 1976, when the final agreement upon the contract was made?

A. Yes.

Q. Do you remember any statement by any of the Union representatives with respect to the question as to whether or not

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Bonanno was involved in, or the question of Bonannos' involvement?

A. Yes.

Q. And will you tell us please, was this during the joint session between the Employer's representatives and the Union representatives?

A. That's right.

Q. And will you tell us please who said, who made the statement and what was said, as best you can remember?

A. Well, the best I can remember is the meeting went on, towards the end of the meeting it was just a clarification of what the management committee was offering. And, I can't remember whether it was Mr. Salter or Mr. Lyden said that now this doesn't have anything to do with Bonanno, that is the only thing that was said about Bonanno. And I think Mr. Reardon or Mr. Walsh said, that's right.

MR. COVEN: I have no further questions.

JUDGE FITZPATRICK: Mr. McDonald, any redirect?

REDIRECT EXAMINATION

Q. (By Mr. McDonald) Were you in the room for Mr. Reardon's testimony today?

A. Yes.

Q. You heard him testify that Mr. Salter's statements were with respect to concluding some kind of litigation that occured?

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MR. COVEN: I object to Mr. McDonald characterizing Mr. Reardon's testimony, I don't think it is proper. The testimony speaks for itself.

JUDGE FITZPATRICK: I agree it speaks for itself, but I think he is just calling attention to the subject matter. He is not testifying—

MR. COVEN: I have no objection to him calling attention to the subject matter without his characterizing or trying to interpret the testimony.

JUDGE FITZPATRICK: I don't view it that way. He has got to call it something.

Overruled.

You may answer.

THE WITNESS: Could you ask the question again, please?

Q. (By Mr. McDonald) Could you read the question back?

(The pending question was read by the Reporter as follows:

"Q. You heard him testify that Mr. Salter's statements were with respect to concluding some kind of litigation that occured?")

Q. (By Mr. McDonald) Do you recall his testimony?

A. I recall.

Q. Would you say it was accurate?

A. There was talk about the litigation between Salter and Lyden and our attorneys. I don't know exactly what it was.

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Q. Do you remember the question put to Mr. Salter immediately prior or to Mr. Lyden you testified that when they said to you—
A. I don't think what I was talking about had anything to do with the litigation.
Q. Do you recall the question—
MR. COVEN: May we ask the witness be permitted to finish?
JUDGE FITZPATRICK: I think the witness should be allowed to finish his sentence, what were you saying?
THE WITNESS: There was discussion about the litigation that as we were explaining the money in the package, I remember either Mr. Lyden or Mr. Salter making a statement that this doesn't have anything to do with Bonanno.
Q. (By Mr. McDonald) Do you recall the question or the statement that was put to them immediately prior to that statement?
A. Do I recall the meeting, no I don't.
Q. Now the final settlement that was arrived at between the Employer's Group and Local 25 included a noncommissioned wage package, is that correct?
A. That's correct.
Q. And was this final settlement significantly higher than the last wage offer that the Companies had made to Local 25?

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A. I am not familiar with the previous offer, but if you take the total monies of the retroactive, it was several hundreds of dollars involved and it was an awful lot of money.
Q. Did you recall that the Employer's Group increased its wage offer just prior to the acceptance of the Union package?

A. I don't recall it, but if you say that is what happened and the record shows it, I would agree. My memory just isn't that good.

MR. MCDONALD: I have no further questions.

JUDGE FITZPATRICK: Mr. McDonough?

MR. MCDONOUGH: I just have a couple, Your Honor.

Q. (By Mr. McDonough) Mr. Spilios, you said in your testimony that just before Bonanno withdrew that there was a credibility problem that arose, and that two of the companies tried to negotiate separately, and you named Morgan and Standard. Do you know who made the overtures to negotiate separately? By that I mean do you know whether those companies approached the Union or the Union approached the company?

A. I am not positive about it, I have always had the feeling that the companies approached the Union; but I have never asked myself the question.

Q. One more question.

Did anything come of those negotiations individually?

A. No.

MR. MCDONOUGH: Nothing further.

MR. COVEN: I have nothing further.

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JUDGE FITZPATRICK: You may step down, thank you.

(Witness excused.)

MR. MCDONALD: I have nothing further.

JUDGE FITZPATRICK: What do you now propose, Mr. McDonald?

We will go off the record.

(A short recess was taken.)

JUDGE FITZPATRICK: On the record.

I understand you have talked to Mr. Reardon, would you state for the record—

MR. COVEN: Mr. Reardon just called me back, to tell me that he had received a telephone call from the gentleman he had spoken to earlier who told him he had to contact his principal in Chicago before being able to give an answer on the question of waiver or privilege; and he told me that this gentleman had advised he had not yet been able to reach his principal in Chicago and didn't know when he would be able to reach him. And, furthermore, that his recommendation to his principal would be that the principal should not waive the privilege. That's all I can tell you at this point.

JUDGE FITZPATRICK: Mr. McDonald, what is your pleasure?

MR. MCDONALD: I would simply state, Your Honor, that I would concur with the course of action outlined by Your Honor previously, concerning this. That in the event Mr. Reardon was unable to make contact by the time the rest of the testimony

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was closed, and in view of counsel's representations that in any event Mr. Reardon's advice would—

MR. COVEN: Not Mr. Reardon's advice, the other gentleman's advice. No, Mr. Band's advice to his principal would be that his principal should not waive it.

MR. MCDONALD: In view of that representation, I don't think it would behoove us to keep the record open.

JUDGE FITZPATRICK: All right.

I gather then that concludes the evidence?

MR. COVEN: May I have a few minutes to confer with Mr. Bonanno as to whether or not we may want to offer any testimony in response to the testimony of the last witness?

JUDGE FITZPATRICK: Surely.

We will go off the record for a few minutes.

(A short recess was taken.)

JUDGE FITZPATRICK: On the record.

MR. COVEN: If Your Honor please the Respondent has no further testimony, at this time; and we feel the record is complete without adding anything further. There is nothing we might offer by way of testimony that I think could add to the material part of the record; therefore we will rest at this time.

JUDGE FITZPATRICK: Thank you.

That concludes the testimony.

Mr. McDonough, do you wish to make a closing statement?

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MR. MCDONOUGH: I prefer to reserve that for briefs, Your Honor.

JUDGE FITZPATRICK: Mr. McDonald?

MR. MCDONALD: I will submit a brief.

MR. COVEN: I would like to make a closing statement. I won't repeat everything I said before, because we are standing on that position, but the second part of our position deals with this question as to the Union's consent or assent as to whether or not the Union should be permitted to object to or to take the position at this late stage that Bonanno should be held liable on the contract. And, again, without repeating anything with respect to the impasse question; I want to refer only to what happened after the withdrawal.

We have the withdrawal on November the 21st, according to the stipulation and the testimony. Mr. Bonanno gave a copy of this withdrawal letter to the Employer's Group, and then left the meeting of the Group on the 21st. On the same day he attempted to deliver a copy of the letter to Mr. Salter at the Union; and was unable to reach him and left word to call him back. And Salter's testimony was he called Bonanno back and Bonanno read to him the letter, and Salter said

what his testimony—we will wait until we get a copy. He asked if Bonanno was going to send him a copy, he said he would, and Salter said, well we will take it up with our attorney's after we get a copy or words to that effect.

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He testified he received the letter I think on the 24th of November, which was the following Monday, which makes sense—despite our postal systems.

Now, I want to point out also that on November the 24th, Mr. Walsh of the Employer's Group counsel wrote to the Union telling them, we understand that Bonanno has withdrawn and goes on then to say that we are terminating the lockout and so on. And, I say, this, that if at that time the Union had any objection to Bonanno withdrawing, they should have spoken up at least—well certainly by that time. Because the lockout was terminated strictly on the basis that Bonanno had withdrawn from the group.

If the Union was contending or made an contention at all that Bonanno had improperly withdrawn from the Group and was going to be bound; they should have spoken up; instead they waited. They reaped the benefits of Bonanno's withdrawal and now they come around and they want to say, well Bonanno is responsible.

But, even if they had done that a week later, I—but they didn't do it a week later. They did it only approximately five months later. During the intervening period of time, five months, there were various meetings starting I think with December the 1st. The Union at that time, Mr. McCarthy, the president of the Union who is the chief spokesmen at that particular meeting said something along the lines, well we

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understand that Bonanno or we have been notified Bonanno is no longer a member of the Group or words to that effect. And the Employer's representative said that's correct; and then they went on negotiating.

McCarthy or nobody else at that time said wait a while, we are going to hold Bonanno responsible. Again, they have another meeting, they had several other meetings, until finally came April the 13th, this is four—four and a half months after Bonanno's withdrawal. And, at that point—and may I say certainly—that there was no—the impasse had continued until apparently April 5th or April the 13th on those commissions. April 5th or April 13th, according to Mr. Spilios, they had changed their offer on April the 5th, and contingent upon the Union's changing their position on the commission; and the union indicated on April 13th, indicated they were willing to drop the commissions and they went back in. And, again, before they agreed to anything there was discussion where does this leave Bonanno? And testimony is that they said Bonanno isn't part of the group, he is separate, he isn't covered by this.

Of course, there is testimony by Mr. Reardon that this came after some discussion of litigation; but the fact is that they said Bonanno isn't part of this. And, certainly if they contended that Bonanno was part of it, they should have spoken up.

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Now, Bonanno is prejudiced if they had taken the position way back Last November that Bonanno had no right to withdraw. Bonanno might very well have gone back to the group and said, okay if they say I have no right to withdraw then I

am going to stay with the Group and withdraw my withdrawal and stay with the group. The Group at that time might then have said that if Bonanno is part of the Group, we won't terminate our lockout or we will reinstitute our lockout if they had already terminated it. There were all sorts of things that might have happened, if the Union had made its position clear at that time. And, certainly I say it is clear from the testimony that this was only an afterthought.

What they wanted to do was get the benefit of Bonanno's withdrawal, and only afterwards, when it was all over did they say we consider Bonanno responsible. And, I say that this testimony indicates that it is—if the Union had implicitly consented to the withdrawal or certainly that they should be stopped from contending that Bonanno had no right to withdraw—

JUDGE FITZPATRICK: Are you arguing that termination of the lockout was a quid pro quo for the benefit of union members to return to work, was a quid pro quo for the separation of Bonanno from the group?

MR. COVEN: It was a direct result. I don't know whether you can call it a quid pro quo. It was a direct result. If Bonanno had not withdrawn from the Group, there was no reason

[102]

for the Group to discontinue its lockout.

You will remember the stipulation shows, and the testimony is, that when the Union struck Bonanno the Employer's Group locked out their employees. When Bonanno withdrew and was no longer a part of the Group, the group terminated the lockout, called their employees back to work. That is shown in Mr. Walsh's letter of November 24th, Joint Exhibit No. 5. Whether it was a quid pro quo in so many words; I can't say at this point. But, certainly it was a direct result of

Bonanno's withdrawal and if the Union at that time or at any time subsequent had contended that Bonanno had improperly withdrawn, that Bonanno was going to be considered part of the Group, then certainly it would have given Bonanno a chance to rethink his position, or to consider—reconsider his position or to consider some change. He might have gone back to the Group, who knows. He might have given the Group an opportunity to rethink the question as to whether or not there was a lockout.

I say it was incumbent upon the Union if they felt Bonanno had improperly withdrawn to make it known at once. They didn't, up to and including April the 13th. And, the first time they made their position known, even before they had asked Bonanno to sign the contract or make any representation to him that he was bound by the contract, the first thing they did was file an unfair labor practice charge before they had even made any demand on him that he sign the contract.

[103]

Or indicated to him or anybody else that they considered him bound by the contract.

I therefore at this time, Your Honor, move to dismiss the Complaint on basis that the overwhelming evidence shows number one, that Bonanno had a right to withdraw, that there was an impasse and Bonanno had a right to withdraw as a result of the impasse. And, that number two, in any event the testimony shows that the Union had implicitly or otherwise contended to or assented to withdraw and should be stopped in any event from contending that Bonanno is bound by the terms of the contract.

JUDGE FITZPATRICK: Thank you.

I don't see any great need for a lengthy time for briefs. The area of disputed facts are fairly limited thanks to the good of-

fices of counsel, much of the record is in the form of stipulated evidence. The big questions are questions of law and policy. I would appreciate your citing appropriate case law to me, it would be a big help.

I will set close of business September 20 as the time when briefs are due.

MR. COVEN: May I ask, Your Honor, I realize the issues are fairly limited; but it might be a little difficult for me in view of my schedule to get a brief in by September 20th. May I ask that we have 30 days from today, would that be asking too much?

[104]

JUDGE FITZPATRICK: Supposing I make it the close of business September 24th.

MR. COVEN: That is a little less than 30 days, today is August the 30th.

JUDGE FITZPATRICK: I will make it close of business September 27, okay?

MR. COVEN: Thank you, sir.

JUDGE FITZPATRICK: If there is nothing further, this hearing is closed.

(Whereupon, at 4:05 p.m., the hearing in the above entitled matter was closed.)

JOINT A

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FIRST REGION

In the Matter of CHARLES D. BONANNO LINEN SERVICE, INC.	
and	CASE NO. 1-CA-11,628
TEAMSTERS LOCAL UNION NO. 25, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA	

STIPULATION

The undersigned parties hereby stipulate as follows:

1. For some years prior to September 21, 1972 the following named companies, Charles D. Bonanno Linen Service, Inc., Bristol Coat & Apron Service Co., Loyal Crown Linen Service, Inc., Delaney Linen Service, Inc., Federal National Linen Service Co., Independent Leasing Corporation, Gilman Towel Supply So., [sic] Inc., Morgan Services, Inc., Norfolk County Linen Service and Stancard Linen Service, negotiated as an "Employers' Group" with Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 25, hereinafter referred to as the "Union," in an appropriate

unit consisting of the Employers' linen supply truck drivers, and helpers.

2. On September 21, 1972, the above-named companies signed individuals and identical agreements which by their terms were to remain in effect until April 18, 1975 and thereafter until amended by mutual agreement or terminated in accordance with their terms. The Bonanno contract, a copy of which is attached hereto as Joint Exhibit #1, and made a part of this stipulation, contained the provision that "either party desiring to amend or terminate the contract shall on or after February 15, 1975 notify the other party in writing of said intention."

3. On March 14, 1975, the Employers' Group and Union held their first meeting for the purpose of negotiating a new collective bargaining agreement. After meetings held on March 19 and 26, April 1, 3, 11, 13, 14, 16, 17 and 30, 1975, the parties on April 30 arrived at an agreement, subject to ratification by the Employers' Group drivers, which provided for the payment of the drivers on an hourly basis. On May 4, 1975, the drivers voted to reject the contract.

4. By letter dated April 18, 1975, a copy of which is attached hereto as Joint Exhibit #2 and made a part of this stipulation, the Union advised each Company in the Employers' Group, including Charles D. Bonanno Linen Service, Inc., hereinafter referred to as Bonanno, that it was giving the sixty (60) day notice of termination, pursuant to the terms of the 1972 Agreement referred to in Paragraph 2 above.

5. By letter dated April 23, 1975, a copy of which is attached hereto and made a part hereof as Joint Exhibit #3, the Companies composing the Employers' Group, through their counsel, offered to meet with the Union for the purpose of negotiating a new Agreement. Thereafter a Federal Mediator attended and participated in all subsequent bargaining meetings referred to herein.

6. On May 12, 1975, the parties met, at which time the Union proposed that the drivers be compensated on a commission basis rather than on an hourly rate. This proposal was rejected by the Employers' Group in accordance with the position it had previously taken at the negotiation meeting held on April 14, 1975, as well as at meetings held prior thereto.

7. The parties met again on May 15, 1975, at which time the Union insisted that drivers be paid on a commission basis. This method of wage payment was again rejected by the Employers' Group and the Union was advised that the Employers' Group would accept a strike rather than concede on this issue.

8. At the next meeting held on May 20, 1975, the Union continued to insist that no contract could be consummated unless the drivers were paid on a commission basis. The Employers' Group again rejected this demand.

9. A further bargaining meeting was held on June 18, 1975 in an attempt to break the impasse which had been reached on May 15, 1975 concerning the method of driver payment, among other outstanding issues.

10. On June 23, 1975, the Union called a selective strike against Bonanno. All of Bonanno's drivers participated in such strike. Following the commencement of the strike at Bonanno, the remaining companies in the Employers' Group locked out their drivers. The strike against Bonanno has continued to the present date.

11. Thereafter the parties, including Bonanno, met again on July 22, August 15, and September 2, 1975, but were still unable to resolve the continuing impasse on method of payment to drivers, among other issues.

12. By letter dated November 21, 1975, a copy of which is attached hereto as Joint Exhibit #4 and made a part hereof, Bonanno advised the Employers' Group that it was revoking

its prior authorization of the negotiating committee of the Employer's Group to bargain on its behalf and that; "The Company is withdrawing from the association with specific respect to negotiations at this time because of an ongoing impasse with Teamsters Local 25." Bonanno also advised the Employers' Group that it would engage in collective bargaining negotiations directly with the Union. On the same date a copy of said notice was mailed to the Union and orally read to Union Field Representative Salter over the phone.

13. At various dates between June 23, 1975 and November 21, 1975 Bonanno hired permanent replacements for all of its striking drivers.

14. By letter dated November 24, 1975, a copy of which is attached hereto and made a part hereof as Joint Exhibit #5, Counsel for the Employers' Group advised the Union that it was his understanding that the Union had been notified that Bonanno had withdrawn from the Employers' Group and stated that the remainder of the Group would continue to negotiate with the Union. The letter also advised the Union of the termination of the lockout by the remaining members of the Group.

15. On December 1, 1975, February 4, April 5 and April 13, 1976, the Union and the representatives of the remaining members of the Employers' Group, pursuant to the November 24, 1975 letter (Joint Exhibit #5) met without Bonanno. On April 13, 1976 the Union dropped its "commission payment" demand and accepted the Employers' Group revised hourly wage offer, and agreement was reached on a new contract, a copy of which is attached hereto as Joint Exhibit #6, and made a part of this stipulation.

16. By letter dated April 29, 1976, the Union informed Bonanno that it had at no time consented to Bonanno's withdrawal from "an association of laundry employers known as the Massachusetts Linen Supply Association" and

that it considered Bonanno to be a member of the Association and bound by the terms of the settlement reached with the Association. A copy of said letter is attached hereto as Joint Exhibit #7 and made a part hereof.

17. By letter dated May 3, 1976, a copy of which is attached hereto as Joint Exhibit #8 and made a part of this stipulation, Counsel for Bonanno advised the Union that Bonanno was not bound by the collective bargaining agreement referred to in the Union's letter dated April 29, 1976 (Joint Exhibit #7). A copy of said letter is attached hereto as Joint Exhibit #8 and made a part hereof.

It is further agreed that the above stipulation of fact shall be introduced in lieu of formal testimony at the hearing to be held in this matter before an Administrative Law Judge, and shall be received as evidence by the Administrative Law Judge with the understanding that the parties hereto will not be precluded from offering additional relevant testimony in the hearing.

CHARLES D. BONANNO LINEN SERVICE, INC.

By /s/ Sidney A. Coven	Attorney	8/27/76
(Representative)	(Title)	(Date)

TEAMSTERS LOCAL UNION NO. 25, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

By /s/ Alan J. McDonald	Atty	8/27/76
(Representative)	(Title)	(Date)

COUNSEL FOR THE GENERAL COUNSEL

/s/ Francis X. McDonough — 8/27/76

Francis X. McDonough — (Date)
National Labor Relations Board
First Region
Boston, Massachusetts

JOINT I

LINEN SUPPLY DRIVERS CONTRACT

Boston Area

April 18, 1972 to April 18, 1975

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AGREEMENT

AGREEMENT effective this 21st day of September 1972, as of the eighteenth day of April, 1972, by and between Teamsters, Chauffeurs, Warehousemen and Helpers Union Local No. 25, Boston, Massachusetts, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, party of the First Part, hereinafter called the "UNION", as collective bargaining representatives of the linen supply drivers and helpers of the Employer at its location stated below, and Bonanno Linen Service Inc., 167 Mystic Ave., Medford, Mass. 02155, party of the Second Part, hereinafter called the "EMPLOYER", conducting a linen supply business at

ARTICLE I

All present employees who are members of the Local Union on the effective date of this contract shall remain members of the Local Union in good standing as a condition of employment. All present employees who are not members of the Local Union and all employees who are hired hereafter shall

become and remain members in good standing of the Local Union as a condition of employment on and after the 31st day following the beginning of their employment or on and after the 31st day following the effective date of this contract, whichever is later. When the Employer needs additional employees, he shall give the Local Union equal opportunity with all other sources to provide suitable applicants, but the Employer shall not be required to hire those referred by the Local Union. This Article is subject to the applicable provisions of the Labor-Management Relations Law of 1947.

ARTICLE II

1. Except as hereinafter stated, the Employer will make available not less than forty (40) hours of work, Monday through Friday, inclusive, in a work week. To the extent of number of hours added to the ordinarily scheduled work week before or after a work week in which an unworked holiday occurs the hours of the holiday week may be reduced below forty (40). The forty (40) hours above referred to may be scheduled in part on the Saturday preceding or following an unworked holiday. The Employer may schedule in any week trucks to be driven on Saturday to make special or emergency deliveries. Hours paid for, though not worked on the holidays listed in Article III, are not to be considered hours of work within the meaning of this Article.

2. One and one-half (1-1/2) times the regular hourly rate will be paid for time worked after forty (40) hours in a work week and for hours worked on Saturday provided the employee has worked all the hours for which he was scheduled in the same work week. Scheduled hours lost because of sickness evidenced by a doctor's certificate, or because of absence for which the employee is entitled to pay under Article XIII, second

paragraph (Mourning Pay), or because the Employer does not operate his route because of storm, breakdown or

(f) The bidding for this second vacant route shall conclude the bidding and the route thus made vacant shall be assigned at the discretion of the Employer.

(g) No driver salesman shall be allowed to bid for any vacancy if he has not served at least one full year on his assigned route, or at least two full years on a bid route.

(h) This bidding rule shall not apply to temporary summer routes at the seashore nor shall it apply to temporary routes established for less than 120 days, which may be established for sales solicitation purposes.

Section 6. In the event of acquisition or merger, the seniority of employees in the acquiring company shall prevail.

ARTICLE XXVI

The provisions of this Agreement are subject to the Economic Stabilization Act as amended, and to the Executive Orders and Regulations relating to Wage and Price Stabilization. Accordingly payment and continued payment of amounts herein provided are subject to said law, orders and regulations. The Employer and Union will apply for approval if required.

If any provision of this Agreement may not be put into effect because of the Wage and Price Regulations, then such proposals, or any part thereof, including any retroactive requirement thereof, shall become effective at such time, in such amounts, and for such periods, retroactively and prospectively, as will be permitted by law at any time during the life of this Agreement and any extension thereof.

ARTICLE XXVII

Section 1. This Agreement shall be binding on the respective parties and all members of the Union.

Section 2. This Agreement shall become effective September 21, 1972, as of April 18, 1972 with respect to increases under Articles IV, V, VIII and IX, and shall continue in full force and effect until the 18th day of April, 1975 and thereafter until amended by mutual agreement or terminated hereunder. Either party desiring to amend or terminate this Agreement shall, on or after February 15, 1975, notify the other party in writing of said intention. In the event the notice is one of termination, the termination shall become effective not earlier than sixty (60) days following the giving of notice thereof.

Bonanno Linen Service Inc.
(NAME OF COMPANY)

By Charles D. Bonanno Treas.

Teamsters, Chauffeurs, Warehousemen and Helpers Union Local No. 25, Boston, Massachusetts, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

By Herbert T. Salter, Field Rep.

JOINT 2

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN
AND HELPERS UNION

LOCAL NO. 25, I. B. OF T., C., W. AND H. OF A.
Affiliated with the Boston Joint Council of Teamsters and Chauffeurs, No. 10

WILLIAM J. McCARTHY
President and Business Agent
JOSEPH C. CONLON
Secretary-Treasurer

OFFICE:
544 MAIN STREET
BOSTON, MASSACHUSETTS 02129

TELEPHONE 241-8825

April 18, 1975

Re: Termination of
Union Contract
Linen Group

Gentlemen:

Under the terms of Article XXVII, Section 2 of the present working agreement, I hereby give the sixty (60) day notice of termination of said agreement.

Very truly yours,

Herbert T. Salter
Field Representative

HTS/eb

cc. Mr. Gordon L. Rayner
Mr. Richard J. Walsh, Atty.

JOINT 3

TELEPHONE: (617) 523-6250
TELEPHONE: (617) 523-4957
CABLE: WARSTACK
TELEX: 940139

WARNER & STACKPOLE
28 STATE STREET, 20TH FLOOR
BOSTON, MASSACHUSETTS 02109

April 23, 1975

CERTIFIED MAIL –
RETURN RECEIPT REQUESTED

Teamsters, Chauffeurs, Warehousemen
and Helpers Union
Local No. 25, I.B. of T., C., W. and H. of A.
544 Main Street
Boston, Massachusetts 02129

ATTENTION: Mr. Herbert T. Salter, Field Representative
Re: Termination of Linen Supply Drivers
Collective Bargaining Agreement

Gentlemen:

This Notice is given to you on behalf of the following Companies in reservation of the Companies' legal rights to take action upon termination of the contract. You are therefore notified in accordance with Section 8(d) of the National Labor Relations Act as amended that the Companies offer to meet and confer with you for the purpose of negotiating a new contract. Your reply may be sent to me.

C.D. Bonanno Linen Service, Inc.
Bristol Coat & Apron Service Co.
Loyal Crown Linen Service, Inc.

Delaney Linen Service, Inc.
Federal National Linen Service Co.
Independent Leasing Corporation
Gilman Towel Supply Co., Inc.
Morgan Services, Inc. (Boston & Woburn)
Norfolk County Linen Service
Standard Linen Service — Boston
Standard Linen Service — Fall River

Sincerely yours,

Richard J. Walsh

RJW/emr

cc: Federal Mediation & Conciliation Service,
William S. MacDermott, Commissioner
Mass. Board of Conciliation & Arbitration
Mr. Gordon L. Rayner

#739568

JOINT 4

BONANNO RENTAL SYSTEMS

November 21, 1975

TO: LINEN SUPPLY NEGOTIATING COMMITTEE
(consisting of Messrs. Peter Band, Gordon Rayner, Arthur Spilios, Lou Katz, and Charles D. Bonanno).

This is to notify you that Charles D. Bonanno Linen Service, Inc., (the "Company") hereby revokes, its authorization dated February 19, 1975, wherein the company authorized the above referenced committee to act on its behalf in negotiating a new Linen Supply Drivers' Contract with Local Teamsters Union No. 25 I.B.T. to replace the contract which expired pursuant to a sixty (60) day notice of termination from Local 25 dated April 18, 1975, effective 12:01 A.M., June 18, 1975.

The Company is withdrawing from the association with specific respect to negotiations at this time because of an ongoing impasse with Teamsters Local 25. The Company agrees to pay its proportionate share of expenses incurred through the date hereof.

The Company will engage in collective bargaining negotiations directly with Local 25.

Charles D. Bonanno

Charles D. Bonanno
Charles D. Bonanno Linen Service

c.c.: Mr. Herbert Salter, Field Representative for Local 25, 544 Main St., Charlestown, Mass. 02129

Serving New England Since 1898
Bonanno Rental Systems, 162 Mystic Avenue
Medford, Massachusetts 02155 Telephone: 617-395-7800

JOINT 5

TELEPHONE: (617) 523-6250
TELEPHONE: (617) 523-4957
CABLE: WARSTACK
TELEX: 940139

WARNER & STACKPOLE
28 STATE STREET, 20TH FLOOR
BOSTON, MASSACHUSETTS 02109

November 24, 1975

Teamsters, Chauffeurs, Warehousemen
and Helpers Union
Local No. 25, I.B. of T., C., W. and H. of A.
544 Main Street
Charlestown, Massachusetts 02129

ATTENTION: William J. McCarthy, President and Herbert T. Salter, Field Rperesentative

Re: Linen Supply Companies Negotiation

Gentlemen:

It is our understanding that you have been notified that the C.D. Bonanno Linen Service, Inc. has withdrawn from the negotiating group of Linen Supply Companies. This is to inform you that the remainder of the group will continue to negotiate together through a Committee which will be the same as before except that Mr. Charles D. Bonanno has been replaced by Mr. Alan Shapiro. As before, the Committee will be represented by Messrs. Gordon L. Rayner, Richard J. Walsh and Thomas M. Reardon.

Certain of the drivers at the Fall River Plant of Standard Linen Service sought to return to work today and were allowed to commence work. Each of the other Companies have attempted to reach their drivers by telephone this afternoon

requesting them to report to work at the usual time tomorrow morning. Their pay and conditions of employment will be the same as when the walkout began, except for contributions to the Health and Welfare Pension Funds. The Companies are willing to make contributions to these Funds as soon as they may legally do so under the terms of the Labor Management Relations Act of 1947, Section 302(c)(5)(B). This law forbid such contributions except where provided in a written agreement, and the standard form of agreement with the Trustees of each of the Funds also require a collective bargaining agreement as the basis of contribution. Since there is at present no written agreement in force, the Companies are legally prevented from making a contribution.

On behalf of the Companies we offer to meet and confer with you to attempt to reach an agreement on the terms of a new contract.

Sincerely,

Richard J. Walsh
On behalf of the Companies'
Negotiating Committee

RJW/emr

cc: Mr. Daniel J. FitzGibbons,
Bristol Coat & Apron Service Co.
Mr. Alan J. Shapiro
Delaney Linen Service, Inc.
Mr. James H. Connors
Federal National Linen Service Co.
Mr. Allan B. Gilman
Gilman Towel Supply Co., Inc.
Mr. Arthur Spilios
Loyal Crown Linen Service, Inc.

Mr. Peter Band
Morgan Services, Inc.
Mr. Kevin Reardon
Norfolk County Linen Service, Inc.
Mr. Lou Katz
Standard Linen Service, (Div. of Stanlinco, Ltd.)

Mr. Gordon L. Rayner, New England Linen Supply Association
Commissioner William S. MacDermott, FMCS

JOINT 6

LINEN SUPPLY

AGREEMENT

BETWEEN

LOCAL UNION No. 25

Affiliated with
International Brotherhood of
Teamsters, Chauffeurs,
Warehousemen and Helpers
of America

AND

_____

_____

[SEAL]

April 18, 1975 to April 24, 1979

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AGREEMENT

AGREEMENT entered into this 23rd day of April, 1976, by and between Teamsters, Chauffeurs, Warehousemen and Helpers Union Local No. 25, Boston, Massachusetts, af-

filiated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, party of the First Part, hereinafter called the "UNION", as exclusive collective bargaining representatives of the linen supply drivers and helpers of the Employer at its location stated below, and

party of the Second Part, hereinafter called the "EMPLOYER", conducting a linen supply business at

ARTICLE I.

Union Recognition and Union Security; Checkoff

Section 1. *Union Recognition and Union Security.* (a) All present employees who are members of the Union on the effective date of this Agreement shall remain members of the Union in good standing as a condition of employment. All present employees who are not members of the Union and all employees who are hired hereafter shall become and remain members in good standing of the Union as a condition of employment on and after the 31st day following the beginning of their employment or on and after the 31st day following the effective date of this Agreement whichever is later. When the Employer needs additional employees, he shall give the Union equal opportunity with all other sources to provide suitable applicants, but the Employer shall not be required to hire those referred by the Union. This Article is subject to the applicable provisions of the Labor-Management Relations Law of 1947, as amended.

(b) The Employer shall discharge an employee within seven (7) days after receipt of a written notice from the Union that said

ARTICLE XXVII

Term of Contract

(a) This Agreement shall be binding on the respective parties and all members of the Union.

(b) This Agreement shall take effect on April 23, 1976, (effective as of April 18, 1975, April 1, 1976 and April 26, 1976, as appropriate, with respect to certain contributions under Articles VIII and IX and effective as of April 18, 1975 and April 15, 1976, as appropriate, with respect to certain increases under Articles V and VI) and shall continue in full force and effect until the 24th day of April, 1979 and thereafter unless at any time on or after February 23, 1979 either party notifies the other in writing of its desire to amend, modify or terminate this Agreement in which event this Agreement shall expire on the sixtieth day following the giving of said notice.

In the event that neither party provides the other with written notification of its desire to amend, modify or terminate this Agreement on or before April 23, 1979, then at any time thereafter either party may notify the other in writing of its desire to amend, modify or terminate this Agreement in which event this Agreement shall expire on the sixtieth day following the giving of said notice.

FOR THE COMPANY

_____

(Name of Company)

By: _____

FOR THE UNION:

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION LOCAL No. 25, BOSTON, MASSACHUSETTS, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA.

By: William J. McCarthy
President

By: Herbert T. Salter
Field Representative

JOINT #7

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN
AND HELPERS UNION

LOCAL NO. 25, I. B. OF T., C., W. AND H. OF A.
Affiliated with the Boston Joint Council of Teamsters and Chauffeurs, No. 10

WILLIAM J. MCCARTHY
President and Business Agent
JOSEPH C. CONLON
Secretary-Treasurer

OFFICE:
544 MAIN STREET
BOSTON, MASSACHUSETTS 02129

TELEPHONE 241-8825

April 29, 1976

Charles D. Bonanno Linen Service Inc.
162 Mystic Avenue
Medford, MA 02155

Attention: Mr. Charles D. Bonanno

Dear Sir:

This is to advise you that Local Union No. 25 has at no time consented to your withdrawal from an association of laundry employers known as the Massachusetts Linen Supply Association. Moreover, Local Union No. 25 considers you to be a member of that Association and to be bound in full to all terms of settlement reached with the Association during the recently completed collective bargaining negotiations.

Very truly yours,

William J. McCarthy
President

HTS/eb

JOINT #8

LEPIE AND COVEN
ATTORNEYS AT LAW
TEN TREMONT STREET
BOSTON, MASSACHUSETTS 02108

JOSEPH E. LEPIE
SIDNEY A. COVEN
WARREN D. ATLAS

SPECIALIZING IN
LABOR MANAGEMENT RELATIONS
AND ADMINISTRATIVE LAW

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May 3, 1976

Mr. William J. McCarthy, President
Local 25, Teamsters, Chauffeurs,
Warehousemen and Helpers Union
544 Main Street
Boston, Massachusetts 02129

Re: Charles D. Bonanno Linen Service, Inc.

Dear Sir:

Your letter of April 29, 1976 addressed to the above Company has been referred to this office.

This is to advise you that in our opinion the Company is not bound by the collective bargaining agreement which your Union recently entered into with the association of laundry employers whom you referred to as the Massachusetts Linen Supply Association.

Very truly yours,

Joseph E. Lepie

JEL/sam

cc: Mr. Charles D. Bonanno
Charles D. Bonanno Linen Service, Inc.
162 Mystic Avenue
Medford, MA 02155

Supreme Court of the United States

No. 80-931

Charles D. Bonanno Linen Service, Inc.,
Petitioner,

v.

National Labor Relations Board, et al.

ORDER ALLOWING CERTIORARI. Filed March 9, 1981

The petition herein for a writ of certiorari to the United States Court of Appeals for the First ----------Circuit is granted.

Supreme Court, U.S.
FILED
JAN 9 1981
MICHAEL RODAK, JR., CLERK

80-931

~~No. 80-000.~~

In the
Supreme Court of the United States.

October Term, 1980.

CHARLES D. BONANNO LINEN SERVICE, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD and
TEAMSTERS LOCAL UNION NO. 25,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND
HELPERS OF AMERICA,
Respondents.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Gabriel O. Dumont, Jr.,
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Bateman & Slade, Inc. Boston, Massachusetts

Question Presented.

Did the First Circuit Court of Appeals properly conclude that an impasse in collective bargaining negotiations alone does not constitute an "unusual circumstance" within the meaning of *Retail Associates, Inc.*, 120 NLRB 388 (1958), and thus does not justify unilateral withdrawal by a single employer from multi-employer bargaining?

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No. 80-939.

In the

Supreme Court of the United States.

OCTOBER TERM, 1980.

CHARLES D. BONANNO LINEN SERVICE, INC.,
PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD AND
TEAMSTERS LOCAL UNION NO. 25,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND
HELPERS OF AMERICA,
RESPONDENTS.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Opinions Below, Jurisdiction, and Applicable Statutory Provision.

The "Petition For A Writ Of Certiorari" adequately presents the information required under the above-noted headings.

Statement of the Case.

The instant matter came before the Court of Appeals for the First Circuit upon the application of the National Labor Relations Board (hereinafter, "the Board") for enforcement of its Supplemental Decision and Order issued on August 6, 1979, against Charles D. Bonanno Linen Service, Inc. (hereinafter, "Bonanno" or "petitioner Bonanno"). The application was brought pursuant to § 10(e) of the National Labor Relations Act (hereinafter, "the Act"), 29 U.S.C. § 160(e).

The subject matter of the instant case originally came before the First Circuit pursuant to an application of Bonanno under § 10(f) of the Act, 29 U.S.C. § 160(f), for review of the initial decision and order of the Board. However, subsequent to the docketing of said application, the Board, *sua sponte*, decided to review and to reconsider the issues raised in this case and was granted leave by the First Circuit to withdraw the certified list. The Supplemental Decision and Order referred to above is the result of that review and reconsideration.

The instant dispute grew out of the 1975-1976 contract negotiations between Teamsters Local Union No. 25 (hereinafter, "Local 25") and the New England Linen Supply Association (hereinafter, "the Association") which included Bonanno and nine of its competitors. For some years, Local 25 had negotiated collective bargaining agreements with the Association including the agreement that covered the period from September 21, 1972 through April 18, 1975. On February 19, 1975, Bonanno once again authorized the Association to represent it in negotiations, and in March, 1975, the negotiations commenced (Appendix A at 19-20).[1]

The negotiations continued and by May 15 the parties had reached an impasse over the issue of compensation. Subse-

[1] Citations to "Appendix A" are references to the appendices contained in the "Petition For A Writ Of Certiorari."

quently, on June 23, Local 25 instituted a selective strike against Bonanno which prompted most of the Association members to lock out their drivers. During the summer, the parties continued to meet, and during this time, two Association members contacted Local 25 "presumably in an effort to make a separate settlement"; however, no negotiations took place and no separate agreements were made (*id.* at 20).

By November 21, Bonanno had hired permanent replacements for all of its striking drivers, and on that date, it notified the Association and Local 25 that it was withdrawing from the Association. Local 25 did not consent to that withdrawal, and on April 9, 1976, it filed the unfair labor practice charges out of which the instant controversy has grown.

Subsequent to Bonanno's withdrawal, Local 25 continued to meet and bargain with the Association. As a result of the continued efforts of the parties, an agreement was reached on April 23, 1976 (*see id.* at 20-21), and, thereafter, Local 25 informed Bonanno that it considered Bonanno to be bound by that agreement.

Bonanno's withdrawal from the Association and its ultimate refusal to execute the multi-employer agreement formed the basis for Local 25's assertion that Bonanno was/is engaged in unfair labor practices as defined by §§ 8(a)(1) and (5) of the Act, 29 U.S.C. § 158(a)(1) and (5).

Summary of Argument.

As detailed below, and contrary to the claims of petitioner Bonanno, the decision of the First Circuit herein is not in conflict with *Fairmont Foods Company* v. *NLRB*[2], as the Eighth

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[2]471 F.2d 1170 (8th Cir. 1972).

Circuit in that case was applying then applicable Board policy on the impact of a bargaining impasse on employer withdrawal rights.

Similarly, the decision of the First Circuit is not contrary to *NLRB* v. *Hi-Way Billboards, Inc.*,[3] *NLRB* v. *Associated Shower Door Co., Inc.*,[4] or *NLRB* v. *Independent Association of Steel Fabricators, Inc.*,[5] as the Fifth, Ninth and Second Circuits, in striking the balance between the conflicting interests inherent in matters involving the rights of employers to withdraw unilaterally from multi-employer bargaining, considered and relied on the union's negotiation of interim agreements with certain members of the employer groups.

Finally, while the decision of the First Circuit is contrary to *NLRB* v. *Beck Engraving Co., Inc.*,[6] the instant decision, unlike that of the Third Circuit, reflects the realities of collective bargaining and preserves the integrity of multi-employer bargaining.

Reasons for Denying Review.

Petitioner Bonanno has asserted herein that the decision below "conflicts with the decisions of five other circuit courts on the question of whether an employer may withdraw from a multi-employer bargaining unit upon the occurrence of an impasse in collective bargaining negotiations" (petition at 5). In support of that assertion, petitioner Bonanno cites: *NLRB* v. *Independent Association of Steel Fabricators, Inc.*, 582 F.2d

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[3]500 F.2d 181 (5th Cir. 1974).

[4]512 F.2d 230 (9th Cir. 1975), *cert. denied*, 423 U.S. 893 (1975).

[5]582 F.2d 135 (2d Cir. 1978), *cert. denied*, 439 U.S. 1130 (1979).

[6]522 F.2d 475 (3d Cir. 1975).

135 (2d Cir. 1978), *cert. denied*, 439 U.S. 1130 (1979); *NLRB* v. *Beck Engraving Co., Inc.*, 522 F.2d 475 (3d Cir. 1975); *NLRB* v. *Hi-Way Billboards, Inc.*, 500 F.2d 181 (5th Cir. 1974); *Fairmont Foods Company* v. *NLRB*, 471 F.2d 1170 (8th Cir. 1972); and *NLRB* v. *Associated Shower Door Co., Inc.*, 512 F.2d 230 (9th Cir.), *cert. denied*, 423 U.S. 893 (1975) (*see id.* at 5 n.5), as instances where various courts have upheld an employer's right to withdraw unilaterally from multi-employer bargaining upon the existence of a negotiating impasse.

Said assertion, however, is substantially erroneous. Thus, unlike in the instant case, the Eighth Circuit, in *Fairmont Foods Company* v. *NLRB, supra*, was not asked to determine whether an impasse in negotiations justified a multi-employer association member's unilateral withdrawal from group bargaining, since the Board, at that time, apparently assumed that a bargaining impasse was a sufficient justification for a party's unilateral withdrawal from multi-employer bargaining.

In this regard, the cornerstone of the Board's policy regarding the right of an employer or a union to withdraw from multi-employer bargaining was set out in *Retail Associates, Inc.*, 120 NLRB 388 (1958), wherein the Board established guidelines for withdrawal. Pursuant to those guidelines, withdrawal by an individual employer or a union with respect to one or more employers is allowed prior to the start of negotiations only if adequate written notice is given. Once negotiations begin, a party may withdraw only in cases of mutual consent or "unusual circumstances." *Id.* at 395.

Prior to *Retail Associates, Inc.*, the Board permitted unfettered withdrawal at impasse. *See Morand Brothers Beverage Co.*, 91 NLRB 409 (1950), *enforced in part and remanded in part*, 190 F.2d 576 (7th Cir. 1951). In fact, during this period the Board suggested that "employers [have] unlimited freedom unilaterally to fashion the scope of, or to completely destroy,

multi-employer bargaining units by simply withdrawing at any time from such units at their will or fancy." *Id.* at 418.

Subsequent to *Retail Associates, Inc.*, the Board continued its earlier impasse policy by indicating that an impasse in negotiations constituted an "unusual circumstance." *See Plumbers Union No. 323 (P.H.C. Mechanical Contractors)*, 191 NLRB 592, 592 n.1, 596 (1971); *Tulsa Sheet Metal Works, Inc.*, 149 NLRB 1487, 1500 (1964); and *Atlas Sheet Metal Works, Inc.*, 148 NLRB 27, 29 (1964). *But see Teamsters Local 717 (Ice Cream Council)*, 145 NLRB 865 (1964).[7] Thus, in *Fairmont Foods Co.*, 196 NLRB 849 (1972), the Board adopted the rulings, findings and conclusions of the trial examiner who had found that "respondent's complaint . . ., while it reflected disagreement between the Respondent and the other members of the group, was not the kind of impasse or other 'special circumstance' which would privilege the Respondent's otherwise untimely withdrawal from the group bargaining . . .." *Id.* at 856.

Accordingly, on review, the question of the impact of an impasse in multi-employer bargaining on employer withdrawal rights was not at issue, and as such, the Eighth Circuit's restatement[8] of the then Board policy on said rights properly cannot be characterized as inconsistent with the affirmance by the First Circuit of present Board policy.

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[7] In *Teamsters Local 717 (Ice Cream Council)*, the Board, in the context of a § 8(b)(1)(B) charge, seemingly suggested that an impasse alone would not justify an employer's unilateral withdrawal. In this regard, the Board stated that "[i]n a situation such as this, where there has been a breakdown in negotiations leading to an impasse and a resultant strike, an employer, *if he so chooses and the union agrees*, is not precluded from voluntarily withdrawing from a multiemployer unit." 145 NLRB at 870 (emphasis added).

[8] When an impasse in negotiations is reached, withdrawal by a member of a multi-employer bargaining group is excused.

471 F.2d at 1172.

In addition to the holding in *Fairmont Foods Company* v. *NLRB*, *supra*, petitioner Bonanno, as noted above, has asserted that the conclusions of the courts of appeals in *NLRB* v. *Hi-Way Billboards, Inc.*, *supra*, *NLRB* v. *Associated Shower Door Co., Inc.*, *supra*,[9] and *NLRB* v. *Independent Association of Steel Fabricators, Inc.*, *supra*, are in conflict with the conclusions of the First Circuit herein. In so arguing, petitioner Bonanno incorrectly states that the courts of appeals in said cases concluded "that an impasse in multi-employer bargaining is an unusual circumstance within the meaning of *Retail Associates*, *supra*" (petition at 8) (see also petition at 10).[10]

In this regard, while the employer withdrawals at issue in *Hi-Way Billboards, Inc.*, *Associated Shower Door Co., Inc.* and *Independent Association of Steel Fabricators, Inc.*, all occurred subsequent to the existence of a bargaining impasse, each was occasioned, at least in part, by the union's negotiation of interim agreements with other employer association members. Moreover, each court of appeals, in overturning the decision of the Board, focused on the "whipsaw" effect of the union's negotiation of interim contracts. Thus, for example, the Ninth Circuit in *NLRB* v. *Associated Shower Door Co., Inc.*, 512 F.2d at 232, stated the following:

> The Board has held that a union which has commenced collective bargaining with a multi-employer unit may withdraw from the multi-employer unit with respect to

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[9] The Ninth Circuit recently reaffirmed its *Associated Shower Door* holding and analysis in *H&D, Inc.* v. *NLRB*, F.2d , 105 LRRM 3070 (9th Cir. 1980).

[10] The courts which have considered the issue (with the exception of the First Circuit) have uniformly concluded that in balancing the conflicting legitimate interests of the parties in the multi-employer bargaining context, an employer must be allowed to withdraw from a multi-employer group upon impasse.

one or more employers while continuing multi-employer bargaining with those employers remaining in the multiple unit. *Pacific Coast Association of Pulp and Paper Manufacturers*, 163 N.L.R.B. 892, 895-896 (1967). Since the Board has committed itself to preserving the equality of withdrawal rights in the multi-employer unit situation, *see The Evening News Association*, 154 N.L.R.B. 1494, 1495-1497 (1965), enforced *sub nom. Detroit Newspaper Publishers Association* v. *NLRB*, 372 F.2d 569, 572 (6th Cir. 1967), it seems only fair that, when an impasse is reached *and* a union then engages in selective picketing *and enters into substantial individual agreements with employers who had been members of the multi-employer unit*, the withdrawal *of the remaining members of the unit*, if unequivocally communicated, should be permitted. *See NLRB* v. *Hi-Way Billboards, Inc.*, 500 F.2d 181, 183-184 (5th Cir. 1974); *Fairmont Foods Company* v. *NLRB*, 471 F.2d 1170, 1172-1174, 1174 n.1 (8th Cir. 1972); *Connell Typesetting Company*, 212 N.L.R.B. No. 140 (1974)" (emphasis added).

See also NLRB v. *Hi-Way Billboards, Inc.*, 500 F.2d at 184[11]; *NLRB* v. *Independent Association of Steel Fabricators, Inc.*, 582 F.2d at 147.[12] Accordingly, *Hi-Way Billboards, Inc.*,

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[11] In a case like this one involving a single Union and several employers, the Board's response simply does not ring true so long as the Union may in effect withdraw from the multi-employer association with respect to one or more employers while continuing multi-employer bargaining with those employers remaining in the multiple unit.

[12] That Local 455 agreed to negotiate separately with four former members of the Association during the August to January interval (Dextra, Atwater, North Shore, and Charla) is also indicative of the inability of the union and the Association to engage in fruitful discussion. Moreover, although the union did not selectively picket or otherwise

Associated Shower Door Co., Inc. and *Independent Association of Steel Fabricators, Inc.* each presented a factor which was considered significant by the courts of appeals in finding an "unusual circumstance" and which is not present in the instant case, *i.e.*, the existence of interim agreements.

The existence of this additional factor is a particularly compelling distinguishing characteristic given the analytical process applicable to questions arising in the context of multi-employer bargaining. In this regard, this Court in *NLRB* v. *Truck Drivers Local Union No. 449 (Buffalo Linen Supply Co.)*, 353 U.S. 87 (1957), noted that the resolution of questions regarding the rights of both employers and unions in the context of multi-employer bargaining required the balancing of conflicting legitimate interests, and that "[t]he function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." *Id.* at 96. Thus, in cases involving Board determinations of the rights of employers to withdraw from multi-employer associations, the circuit courts of appeals are reviewing the balance struck by the Board. Clearly, the decisions of the courts of appeals reflect all the factors considered and therefore, must be compared in the light of those factors.

In sum, petitioner Bonanno, in characterizing the courts' holdings in *Hi-Way Billboards, Inc.*, *Associated Shower Door Co., Inc.* and *Independent Association of Steel Fabricators,*

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pressure any particular member, its willingness to negotiate separately with several members had something of a whipsaw effect on the remaining members who watched certain of their withdrawing competitors resume business while they themselves were still in the throes of an economic strike. *Cf. NLRB* v. *Association Shower Door, supra*, 512 F.2d at 232 [*sic*]; *N.L.R.B.* v. *Beck Engraving, supra*, 522 F.2d at 482-83; *N.L.R.B.* v. *Hi-Way Billboards, supra*, 500 F.2d at 183.

Inc. has ignored the courts' reliance on the existence of interim agreements in balancing the conflicting legitimate interests in each case and thereby has mischaracterized those holdings as being in conflict with the instant decision of the First Circuit.

Lastly, while petitioner Bonanno correctly asserts that *NLRB* v. *Beck Engraving Co., Inc.* is contrary to the decision of the First Circuit (*see* Appendix A at 33),[13] Bonanno's reliance in support of its Petition on the Third Circuit's reasoning in *Beck Engraving Co.* is misplaced.

In this regard, the flaws in the analysis of the Third Circuit are set forth succinctly in the opinion of the First Circuit and need not be repeated herein (*see id.* at 29-30, 33-36). However, petitioner Bonanno's suggestion that an impasse in bargaining destroys the salutory purposes of multi-employer bargaining demands comment (*see* petition at 5, 6, 14).

It is apparently undisputed that in resolving questions arising in the context of multi-employer bargaining, the Board and, when applicable, the courts, must seek to preserve the integrity of multi-employer bargaining. *See NLRB* v. *Truck Drivers Local Union No. 449 (Buffalo Linen Supply Co.), supra.* However, the suggestion by petitioner Bonanno that allowing employer withdrawal at impasse furthers, or at least does not hinder, the concept of multi-employer bargaining because the benefits of group bargaining are frustrated by an impasse ignores the realities of collective bargaining.

First, an impasse in bargaining can never be characterized as "unusual". Rather, an impasse is an integral part of bargaining which often occurs very early in the bargaining process. *See, e.g., Fairmont Foods Company* v. *NLRB, supra* (impasse reached after one month of bargaining); *NLRB* v. *Hi-Way Billboards, Inc., supra* (impasse reached after less than two months of bargaining); *NLRB* v. *Associated Shower*

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[13] By contrast, the *Beck* case is squarely on point.

Door Co., Inc., supra (impasse reached after one month of bargaining); and *NLRB* v. *Association of Steel Fabricators, Inc., supra* (impasse reached after twenty days of bargaining). In addition, in only the most rare situations does an impasse mean an end to collective bargaining. Thus, in all the cases cited by petitioner Bonanno, the union and the association continued to bargain after impasse and ultimately reached an agreement. Accordingly, since an impasse is a regular part of collective bargaining, its existence does not bare on the effectiveness of multi-employer bargaining as a tool for promoting labor stability.

Second, it has been stated that multi-employer bargaining "rests on the reality of the consent of the union and of each employer . . .." *Carvel Co.* v. *NLRB*, 560 F.2d 1030, 1035 (1st Cir. 1977). That consent, however, is a sham if an employer can manipulate the process and create a basis for unfettered withdrawal. In this regard, since the obligation to bargain collectively "does not compel either party to agree to a proposal or require the making of a concession . . .", 29 U.S.C. § 158(d), an impasse can easily be created by an employer simply by that party remaining steadfast in an unacceptable position. Effective collective bargaining is impossible if the parties are not committed to reaching a mutually beneficial agreement.

Finally, the ready availability of withdrawal rights can only lead to the frustration of the multi-employer bargaining process and a return to individual negotiations and the resulting instability and duplication of efforts. For example, in the instant case, Bonanno readily accepted the benefits of multi-employer bargaining including the Association-wide lock out which protected Bonanno's competitive position in the industry. While so insulated, Bonanno hired permanent replacements for its striking drivers (*see* Appendix A at 20). After restaffing, however, Bonanno no longer needed the protection

afforded by the Association and so it withdrew from the group. Thus, Bonanno's withdrawal from the Association served only its own interest and clearly called into question the advisability for either Local 25 or the other Association members of employing the multi-employer collective bargaining process.

In sum, a bargaining impasse does not diminish the benefits of or the need for multi-employer bargaining. However, permitting unilateral withdrawal at impasse unquestionably jeopardizes that process.

Conclusion.

For the reasons set forth in detail above, Teamsters Local Union No. 25 respectfully urges that this Court deny the instant "Petition For A Writ Of Certiorari."

Respectfully submitted,

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No. 80-931

In the Supreme Court of the United States

OCTOBER TERM, 1980

CHARLES D. BONANNO LINEN SERVICE, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

WILLIAM A. LUBBERS
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National Labor Relations Board
Washington, D.C. 20570

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-931

CHARLES D. BONANNO LINEN SERVICE, INC.,
PETITIONER

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NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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1. Petitioner was a member of the New England Linen Supply Association, which had for several years bargained with Teamsters Local Union No. 25 on a multiemployer basis in an Association-wide unit. Petitioner participated in negotiations for a new labor contract in March and April 1975. By May, negotiations reached an impasse over the issue of employee compensation. On June 23, 1975, petitioner's employees struck in support of the Union demands, and the other Association members locked out their employees. Negotiations continued through the summer, but failed to break the impasse. In November 1975, petitioner notified the Union and the other Association members that the Association no longer had authority to bargain on petitioner's behalf. The remaining Association members thereupon terminated their lockout. The Union

continued its negotiations with the Association, eventually reaching agreement on a new contract dated April 23, 1976. (Pet. App. 19-21.)

The Union filed unfair labor practice charges on April 9, 1976, challenging petitioner's attempted withdrawal from the multiemployer unit. On April 29, 1976, the Union informed petitioner that it had never consented to the withdrawal and accordingly considered petitioner bound by the new agreement. Petitioner disagreed. (Pet. App. 21.)

The Board in *Retail Associates, Inc.*, 120 N.L.R.B. 384 (1958), prescribed guidelines to govern withdrawal from multiemployer bargaining units. Under these rules, an employer or union is free to withdraw from the multiemployer unit for any reason prior to the date set for renegotiation of the existing contract or the date on which negotiations actually commence, provided adequate notice is given. Once negotiations for a new contract have begun, however, a party may withdraw only if "mutual consent" is given or if "unusual circumstances" exist. Because the Board does not view an impasse in collective bargaining negotiations as an "unusual circumstance" justifying a unilateral withdrawal from the bargaining unit, the Board in this case concluded that petitioner had engaged in unfair labor practices within the meaning of Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. 158(a)(5). (Pet. App. 38-52.) The court of appeals granted enforcement (*id.* at 37).

2. The court of appeals correctly concluded that the Board's holding constitutes a reasonable accommodation of "conflicting legitimate interests" (*NLRB* v. *Truck Drivers Local Union No. 449*, 353 U.S. 87, 96 (1957)), *i.e.*, the interest of the individual employer in being free to bargain for itself and the public interest in maintaining the stability of the multiemployer unit. For, as the Board

explained, impasse is not an unusual occurrence but rather a foreseeable stage in the bargaining process—akin to a hiatus in negotiations. Moreover, a rule permitting unilateral withdrawal upon impasse would permit a member of the multiemployer unit to avoid its bargaining obligation by creating an impasse whenever it was dissatisfied with the impending agreement. (Pet. App. 41-42, 47.)

However, the decision of the court of appeals in this case is in direct conflict with decisions of the Ninth Circuit in *H & D, Inc.* v. *NLRB*, 633 F.2d 139 (1980), and the Third Circuit in *NLRB* v. *Beck Engraving Co.*, 522 F. 2d 475 (1975), which hold that impasse does permit unilateral withdrawal from a multiemployer unit.[1] See also *NLRB* v. *Associated Shower Door Co.*, 512 F. 2d 230 (9th Cir.), cert. denied, 423 U.S. 893 (1975); *NLRB* v. *Independent Ass'n of Steel Fabricators, Inc.*, 582 F. 2d 135 (2d Cir. 1978), cert. denied, 439 U.S. 1130 (1979).[2] The issue is a recurrent one in the administration of the Act. It is important that this Court resolve the conflict among the circuits, to eliminate the uncertainty that exists regarding the rights of the many employers and unions across the nation who bargain on a multiemployer basis.[3]

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[1]We are considering whether to file a petition for a writ of certiorari seeking review of the decision in *H & D, Inc.* v. *NLRB, supra.*

[2]Although the Fifth Circuit initially concluded that an impasse justifies employer withdrawal from the bargaining unit (*NLRB* v. *Hi-Way Billboards, Inc.*, 500 F. 2d 181 (1974)), it has recently reconsidered that position, and now has upheld the Board's position. *NLRB* v. *Marine Machine Works, Inc.*, No. 79-3938 (5th Cir. Jan. 30, 1981).

[3]A survey of major collective bargaining agreements—those covering 1,000 or more employee—in effect on January 1, 1979, disclosed that approximately 42% of such agreements, affecting approximately 42% of the total employees, were with multiemployer units: of 1,536 major agreements covering 7,540,550 employees, 648 agreements covering 3,238,400 employees were with multiemployer bargaining units. United States Department of Labor, Bureau of Labor Statistics, Bulletin No.

For these reasons, the Board does not oppose the granting of the present petition.

Respectfully submitted.

WADE H. MCCREE, JR.
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FEBRUARY 1981

20-65, "Characteristics of Major Collective Bargaining Agreements —January 1, 1978," at 12, table 1.8 (1980). See also *NLRB* v. *Truck Drivers Local Union No. 449, supra,* 353 U.S. at 94-95.

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No. 80-931

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1980.

CHARLES D. BONANNO LINEN SERVICE, INC.,
PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD
AND
TEAMSTERS LOCAL UNION NO. 25, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief for Charles D. Bonanno Linen Service, Inc.

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Question Presented.

Did the court below err in holding that an employer member of a multiemployer bargaining unit violates the National Labor Relations Act, 61 Stat. 140 (1947), as amended, 29 U.S.C. § 158(a)(5), by unilaterally withdrawing from said unit upon the occurrence of an impasse in collective bargaining negotiations, for the purpose of negotiating individually with the union, and thereafter refusing to execute the multiemployer agreement, where such an opinion is contrary to the decision of five circuit courts of appeals on the same issue?

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Opinions Below.

The opinion issued by the court of appeals is reported at 630 F. 2d 25 (1st Cir. 1980), and is reproduced in Appendix A of the Petition for Certiorari. The Supplemental Decision and Order of the National Labor Relations Board was issued on August 6, 1979, is reported at 243 NLRB No. 140, and is reproduced in Appendix B of the Petition for Certiorari. The National Labor Relations Board's initial Decision and Order

was issued on June 29, 1977, is reported at 229 NLRB 629 and is reproduced in Appendix C of the Petition for Certiorari.

Jurisdiction.

The judgment of the Court of Appeals for the First Circuit was entered on September 12, 1980. On December 10, 1980, Charles D. Bonanno Linen Service, Inc. filed its Petition for Writ of Certiorari which was granted on March 9, 1981. The jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1254(1).

Applicable Statutory Provisions.

The statute involved is the National Labor Relations Act, as amended, 61 Stat. 136, 713 Stat. 519, 29 U.S.C. § 151 et seq. The relevant sections are 29 U.S.C. § 158(a)(1) and (5). The pertinent text is as follows:

> § 8(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title; . . .
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Statement of the Case.

On October 27, 1976, the parties agreed to stipulate to most of the essential facts which relate to the instant matter (J.A. 92-97, Jt. Ex. A, R. 16, 17).[1] Although the testimony adduced

[1] "P." references are to decisions printed in the Petition for Writ of Certiorari; "J.A." references are to portions of the record which are printed in the Joint Appendix.

at the hearing before the Administrative Law Judge revealed some disagreement as to details, there is no real disagreement as to the essential facts. The facts as recited herein were, in effect, adopted by the Administrative Law Judge during the course of his decision (P. 54-60) and were not disturbed in the subsequent proceedings.

Charles D. Bonanno Linen Service, Inc. (hereinafter "Bonanno") is a Massachusetts corporation and is engaged in the laundering, rental and distribution of linen, uniforms and related products (P. 54). The truckdrivers and helpers employed by Bonanno were represented by Teamsters Local Union No. 25, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter the "Union") (P. 55). Bonanno, in the past, had engaged in collective bargaining with the Union as a member of the New England Linen Supply Association (hereinafter the "Association"),[2] which was comprised of 10 employers engaged in the linen service business (P. 55). Bonanno and the other members of the Association each signed individual and identical agreements with the Union covering the period from September 21, 1972 to April 18, 1975 (P. 55).

In accordance with that agreement the Union and Association each gave notice of termination (J.A. 103, 104, Jt. Exs. 2, 3, R. 16, 17). Bonanno authorized the Association to bargain with the Union in its behalf (P. 56).

Commencing in March, 1975, the Association and the Union engaged in negotiations for a new agreement. After several negotiating sessions a proposed contract which provided for compensation of employees on an hourly basis was submitted to the Union membership for ratification. After the employees rejected that contract, the Union at the next

[2] The Association no longer exists. Bargaining between the Union and former Association members has been on an individual Company basis.

meeting proposed that its driver members be compensated on a commission basis rather than on an hourly rate. This position was rejected by the Association in accordance with its prior negotiating position. On May 15, as stipulated by the parties, an impasse in bargaining was reached over the issue of the method of compensating drivers (P. 56; J.A. 94, Jt. Ex. A, R. 16, 17).

On June 23, 1975, the Union called a selective strike against Bonanno and most of the remaining Association members locked out their drivers (P. 57). Subsequent meetings were held over the course of several months, but the parties were unable to resolve the continuing impasse (P. 56-57; J.A. 95, Jt. Ex. A, R. 16, 17).[3]

On November 21, 1975 Bonanno advised the Association and the Union that it was withdrawing from the Association (P. 58; J.A. 106, Jt. Ex. 4, R. 16, 17). Thereupon, the remaining members of the Association terminated the lockout (P. 59).[4]

After several meetings without Bonanno, the Association and Union reached an agreement on a new contract on April 13, 1976. By letter dated April 29, 1976, the Union for the first time informed Bonanno that it considered Bonanno to be bound by the agreement reached with the Association (J.A. 117, Jt. Ex. 7, R. 16, 17). By letter dated May 3, 1976, Counsel for Bonanno advised the Union that Bonanno was not bound by the agreement referred to in the Union's letter of April 29 (P. 60; J.A. 118, Jt. Ex. 8, R. 16, 17).

As a result of an unfair labor practice charge filed by the Union, the National Labor Relations Board (hereinafter "the

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[3] In testimony before the Administrative Law Judge evidence was adduced that the Union met separately with two individual members of the Association, "presumably in an effort to make a separate settlement" (P. 57). There is no record evidence that separate interim agreements were executed.

[4] The strike against Bonanno continued.

Board") summarily affirmed the decision of an Administrative Law Judge, holding that Bonanno violated § 8(a)(1) and (5) of the National Labor Relations Act ("the Act"), as amended, 61 Stat. 136, 140, 29 U.S.C. § 158(a)(1) and (5), by refusing to execute the collective bargaining agreement reached between the Association and the Union, 229 NLRB 629 (1977) (P. 70).

Thereafter, Bonanno applied for review and the Board applied for enforcement of its Order to the United States Court of Appeals for the First Circuit (Case No. 77-1279). After Bonanno had filed its brief, the Board filed, and the court granted, a motion for leave to withdraw the certified list filed in lieu of record in order to reconsider its decision. Subsequently, the Board on August 6, 1979 issued a Supplemental Decision adhering to the position taken in its earlier decision (P. 38).

The Board sought enforcement of its Supplemental Decision and Order with the Court of Appeals for the First Circuit. The court of appeals enforced the decision of the Board (P. 18).[5]

Summary of Argument.

While multiemployer bargaining has become an accepted method for the conduct of collective bargaining negotiations between a union and a confederation of employers, the salutary purposes achieved thereby are negated by the uneven application of the law by the National Labor Relations Board. The Board's rules respecting multiemployer bargaining are slanted against the employer. That form of voluntary bargaining is thereby rendered untenable to employers.

[5] On October 6, 1980 the First Circuit entered an order staying its decree until entry of the final decision of this Court upon a petition for writ of certiorari to be filed by Bonanno.

The Board held that Bonanno's refusal to execute the multiemployer agreement between the Association and the Union, subsequent to its withdrawal from the Association during an impasse in negotiations, was an unlawful refusal to bargain within the meaning of § 8(a)(5) of the Act. The Board maintains that an employer withdrawal, absent mutual consent, from a multiemployer group, after the commencement of negotiations, is ineffective unless justified by "unusual circumstances." "Unusual circumstances" are limited, by the Board, to two remote occurrences, namely pending bankruptcy or significant fragmentation of the group as a result of consensual withdrawals.

After taking diverse positions on the question of whether an impasse in negotiations is an "unusual circumstance," the Board now steadfastly maintains that an impasse is not an "unusual circumstance." Such a conclusion conflicts with a related postulate of law promulgated by the Board that the rules respecting multiemployer bargaining are to apply equally to unions and employers. But such evenhandedness is belied by the Board's sanction of a union's right to negotiate separate agreements with individual employer members of a multiemployer group. Such an unequal application of withdrawal rights does much to destroy the integrity of a multiemployer group and renders bargaining in such a framework futile, unattractive and meaningless.

Recognizing the Board's inflexible approach, five circuit courts of appeals have fashioned an "impasse doctrine" which sanctions an employer's right to withdraw upon the occurrence of an impasse in negotiations. This "impasse doctrine" adequately protects and balances the rights of all parties bargaining in a multiemployer context.

The Board's conclusion that an impasse in multiemployer bargaining is not an "unusual circumstance" does not comport with the realities of bargaining within that framework

and endangers the continued viability of multiemployer bargaining. By allowing a union to partially withdraw from multiemployer bargaining and negotiate a separate agreement, while refusing to allow employer withdrawal at impasse, the Board unfairly disturbs the delicate balance in favor of the union. Such a view negates the Board's ostensible equality of withdrawal standard, and involves the Board in the balancing of economic weapons contrary to this Court's decision in *NLRB* v. *Brown*, 380 U.S. 278 (1965). In addition, the sanctioning of a union's right to enter into separate interim agreements amounts to the rejection, at least in part, of the existence of the multiemployer unit.

The Board's characterization of an impasse as a "temporary deadlock" or "hiatus" ignores the dynamics of multiemployer bargaining. Unlike single employer-union negotiations, an employer in the multiemployer context is confronted, at impasse, not only with an adversarial union but also with a competitor employer member of the group who, having signed a separate agreement with the union, is engaged in productive work while the remaining employer members are enduring a strike. The result is a serious fracturing of the employer group and a breakdown of the uniform approach to collective bargaining contemplated by employers who voluntarily join a multiemployer group.

In order to effectuate the purposes of the Act, withdrawal at impasse should be allowed, so that the Board's policy of equalizing withdrawal rights of both parties is effectuated. Adoption of the "impasse doctrine" will have the salutary effect of insuring stability in collective bargaining. To do otherwise would frustrate meaningful collective bargaining because it requires an employer to remain indelibly tied to fruitless multiemployer bargaining long after that process of collective bargaining has ceased to function productively.

The decision of the First Circuit essentially held that the Board's decision was entitled to enforcement out of deference to its presumed expertise. As this Court has recognized, Congress intended that the courts of appeals serve a meaningful role in the development of our federal labor policy. It is submitted that the Board's refusal to find that an impasse in multiemployer bargaining constitutes an "unusual circumstance" rests upon an erroneous legal foundation. Conversely, the decisions of the five circuit courts, which have fashioned the "impasse doctrine," fairly balance the conflicting interests presented by the instant case. The "impasse doctrine," which allows employer withdrawal from a multiemployer bargaining unit upon the occurrence of an impasse in negotiations, should now be adopted by this Court.

Argument.

I. Withdrawal from Multiemployer Bargaining upon the Occurrence of an Impasse in Collective Bargaining Is Not Violative of the National Labor Relations Act.

A. *Introduction.*

Multiemployer bargaining has become an accepted method for the conduct of collective bargaining negotiations between a union and a confederation of employers. *NLRB* v. *Truck Drivers Local 449*, 353 U.S. 87, 94-96 (1957).[6]

The salutary purposes which may be achieved by this method of collective bargaining are well documented. Congress in its deliberations on the Taft-Hartley Act in 1947

[6] According to the United States Department of Labor in its study of collective bargaining agreements covering 1,000 or more employees, there are 648 multiemployer bargaining agreements, covering more than three million employees. United States Department of Labor, *Characteristics of Major Collective Bargaining Agreements, January 1, 1978*, 12 (Bulletin 2065, April, 1980).

recognized the utility of bargaining on this basis when a proposal to ban industry-wide bargaining was rejected.

This Court too has had occasion to examine, and approve, the virtues of multiemployer bargaining. Thus, in *NLRB* v. *Truck Drivers Local 449*, 353 U.S. 87 (1957), the court concluded that multiemployer bargaining offers advantages to both management and labor. Such a mechanism for bargaining allows an employer to bargain "on an equal basis with a large union" and to avoid "the competitive disadvantages resulting from nonuniform contractual terms." *Id.* at 96. Moreover, multiemployer bargaining permits the union and employer to marshall their resources with a view toward the negotiation of a single collective bargaining agreement. As a result, the process is, in the main, more effective and efficient and industrial discord is reduced. This Court has therefore concluded that multiemployer bargaining is a "vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining." *Id.* at 95.

Yet, under the present state of the law as promulgated by the National Labor Relations Board the future of multiemployer collective bargaining is seriously threatened. The Board's uneven application of its rule respecting multiemployer bargaining whereby it refuses to sanction employer withdrawal from multiemployer bargaining upon the occurrence of an impasse in bargaining, if allowed to stand, will undermine an employer's voluntary determination[7] that such a forum for bargaining is in its best interest. Multiemployer units are created upon the voluntary consent of the parties. If employers perceive that the Board's rules respecting multiemployer bargaining are slanted, they will be reluctant to enter into such a consensual arrangement.

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[7] *Tennessee Consolidated Coal Co.*, 187 NLRB 821 (1971).

Conversely, the "impasse doctrine," fashioned by five courts of appeals,[8] which allows withdrawal upon an impasse in bargaining, fairly protects the interests of both parties to multiemployer bargaining and insures that the guidelines established by the Board will be uniformly applied. Approval of this doctrine will insure the continued viability of multiemployer bargaining.

B. *The Position of the Board on Withdrawal from Multiemployer Bargaining.*

The Board's conclusion that Bonanno's refusal to execute the collective bargaining agreement executed between the Union and the Association violated the Act was grounded on its view that Bonanno's withdrawal was ineffective (P. 51).

In *Retail Associates*, 120 NLRB 388 (1958), the Board established the rules governing withdrawal rights of parties to multiemployer bargaining units. Simply put, once negotiations between the multiemployer group and the union have commenced, neither party may withdraw unless by mutual consent or unless "unusual circumstances" otherwise excused the untimely withdrawal. 120 NLRB at 394.[9]

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[8] *NLRB* v. *Independent Association of Steel Fabricators*, 582 F. 2d 135 (2d Cir. 1978), *cert. denied*, 439 U.S. 1130 (1979); *NLRB* v. *Beck Engraving Co., Inc.*, 522 F. 2d 475 (3d Cir. 1975); *NLRB* v. *Hi-Way Billboards, Inc.*, 500 F. 2d 181 (5th Cir. 1974); *Fairmont Foods Co.* v. *NLRB*, 471 F. 2d 1170 (8th Cir. 1972); *NLRB* v. *Associated Shower Door Co., Inc.*, 512 F. 2d 230 (9th Cir. 1975), *cert. denied*, 423 U.S. 893 (1975).

[9] Prior to its decision in *Retail Associates*, the Board espoused a rule quite different from the one it now seeks to impose. *Association of Motion Picture Producers, Inc.*, 88 NLRB 1155 (1950); *Johnson Optical Co.*, 87 NLRB 539 (1949). In *Morand Brothers Beverage Co.*, 91 NLRB 409 (1950), *enf'd*, 190 F. 2d 576 (7th Cir. 1951), the Board held that "employers [have] unlimited freedom unilaterally to fashion the scope of, or to completely destroy multiemployer bargaining at their will or fancy." *Id.* at 418. A concomitant right was also recognized as being reposed in a union.

The scope of the term "unusual circumstances" was not defined by the Board in its *Retail Associates* decision. Subsequent Board decisions further clouded the issue by initially implying that an impasse in bargaining was not an "unusual circumstance," *Teamsters Local 717* (Ice Cream Council), 145 NLRB 865 (1964), only to later suggest the opposite conclusion. *Plumbers and Steamfitters Local 323* (PHC Mechanical Contractor), 191 NLRB 592 (1971). See *NLRB* v. *Bonanno*, 630 F. 2d 25, 35 (1st Cir. 1980) (P. 24).

In *We Painters, Inc.*, 176 NLRB 944 (1969), the Trial Examiner, affirmed by the Board, held that unilateral withdrawal by an employer after impasse must be unequivocal and accompanied by notice of the union.

> An impasse in bargaining having been reached, a withdrawal of bargaining authorization [from the multiemployer group] would in my opinion have been timely. 176 NLRB at 965.

In *Atlas Sheet Metal Works, Inc.*, 148 NLRB 27 (1964), bargaining between the employer's group and the union had reached an impasse. Thereafter the employer notified both the union and the employer's group that it was withdrawing from multiemployer bargaining. The union did not object either to the withdrawal or to the fact that the employer's representative was resigning from the group's bargaining committee and was being replaced. The Board upheld the employer's unilateral withdrawal from multiemployer bargaining after an impasse had been reached.

In *Tulsa Sheet Metal Works, Inc.*, 149 NLRB 1487 (1964), the Board clearly indicated approval of unilateral withdrawal from multiemployer bargaining upon impasse:

> When group bargaining is the pattern, while it is not presumed that the identity of each individual employer participant becomes merged into a single group identity

> to the extent that, in all circumstances, its freedom to condition or delimit its acceptance of the final bargaining product is forfeited, *its freedom to withdraw while group negotiations are in progress must, of necessity, be severely circumscribed, and normally would require it to bargain only through its designated bargaining agent in good faith to a point of agreement or impasse,* foreclosing full exposure of remaining issues to the moderating influences of the bargaining table. 149 NLRB at 1500 (emphasis added).[10]

While the Board has recognized that certain "unusual circumstances" may require a balancing of competing interests thereby allowing an employer to withdraw after the commencement of negotiations, it has severely limited those instances where withdrawal will be sanctioned. Withdrawal is allowed by the Board in but two instances. Where an employer can demonstrate that it is faced with dire economic circumstances, such as impending bankruptcy, withdrawal from group bargaining will not violate the Act. *U.S. Lingerie Corporation,* 170 NLRB 750, 751 (1968); *Spun-Jee Corp.,* 171 NLRB 557, 558 (1968). The only other situation which constitutes "unusual circumstances," in the Board's view, is where the multiemployer group has been significantly fragmented as a result of consensual withdrawals. *Connell Typesetting Company,* 212 NLRB 918, 921 (1974); *Typographic Services Co.,* 238 NLRB 1565 (1978).

Bonanno withdrew from the Association more than six months after the onset of an impasse in negotiations, and after enduring a prolonged strike. These facts squarely raise the issue as to whether an employer is justified in withdraw-

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[10] See also *Iron Workers, Local 103,* 195 NLRB 980 (1972), wherein the Board strongly implied that once an impasse is reached in negotiations, an employer may withdraw from multiemployer bargaining without the consent of the union.

ing from group bargaining once an impasse in negotiations is reached under the standard set forth by the Board in its *Retail Associates* decision.

The Board resolved its seemingly contradictory cases (compare *Teamsters Local 717* (Ice Cream Council), 145 NLRB 865 (1964), with *Plumbers and Steamfitters Local 323* (PHC Mechanical Contractors), 191 NLRB 592 (1971)) on the question of whether an impasse in negotiations constitutes an "unusual circumstance" in *Hi-Way Billboards, Inc.*, 206 NLRB 22 (1973), *enforcement denied*, 500 F. 2d 181 (5th Cir. 1974). In *Hi-Way Billboards* the Board concluded that an impasse in bargaining was not an "unusual circumstance," and therefore employer withdrawal from multiemployer bargaining at that time was not justified. The Board based its finding on its view that an "impasse cannot be said to be an unexpected, unforseen, or unusual event in the process of negotiations." *Hi-Way Billboards*, 206 NLRB at 23. Rather, an impasse was characterized as a temporary "deadlock" or hiatus in negotiations.

Under its *Hi-Way Billboards* decision, the Board found Bonanno's withdrawal from the Association to be ineffective. Therefore its refusal to execute the collective bargaining agreement agreed to between the Union and the Association was, in the Board's opinion, violative of § 8(a)(5) of the Act (P. 41).[11]

It is submitted that the Board's rule prohibiting employer withdrawal at impasse contravenes two related policy decisions it has applied to multiemployer bargaining. The first line of cases articulates a policy that there should be equality of withdrawal rights. *Pacific Coast Association of Pulp and Paper Manufacturers*, 163 NLRB 892 (1967); *The Evening*

[11] It should be pointed out that by withdrawing from the Association Bonanno did not intend to extinguish its then existing bargaining obligation. Rather, Bonanno only intended to negotiate on an individual basis directly with the Union (J.A. 106, Jt. Ex. 4, R. 16, 17).

News Association, 154 NLRB 1494, 1496-1497 (1965), *enf'd sub nom. Detroit Newspaper Publishers Association v. NLRB,* 372 F. 2d 569 (6th Cir. 1967). The second related principle enunciated by the Board authorizes a union, after commencement of negotiations, to partially withdraw from multiemployer bargaining by entering into separate interim agreements with one or more employer members. At the same time, the union is allowed to insist on negotiating with the remaining employers in the multiemployer unit on a group basis. See, e.g., *Plumbers and Steamfitters Local 323* (PHC Mechanical Contractors), 191 NLRB 592 (1971); *Sangamo Construction Co.,* 188 NLRB 159 (1971).

With respect to equal treatment of both employers and unions who are party to multiemployer bargaining, the Board's egalitarian view is clearly stated in *Evening News Association,* 154 NLRB 1494, 1496 (1965), as follows: "In principle there is no basis for different treatment of union and employer withdrawals from multi-employer bargaining units." Yet, the Board has not adhered to the evenhanded principle it laid down in *Evening News Association.* Rather, it has created an imbalance by allowing a union to engender a partial or *de facto* withdrawal from multiemployer bargaining. Thus, the Board sanctions a union's right to enter into separate agreements with individual employers while requiring that other employers must continue to bargain as part of the multiemployer unit. The Board contends that such agreements may prevent significant unit fragmentation rather than cause it and do tend to facilitate the breaking of impasse.[12] *Charles D. Bonanno Linen Service, Inc.,* 243 NLRB No. 140 (1979) (P. 51). As will be examined in more

[12] The question might be asked why, if that is true, permitting one of the members of the group to withdraw after a lengthy impasse and to bargain separately might not equally serve the same purpose.

detail, such a conclusion does not comport with the realities of multiemployer bargaining.

As illustrated, the Board has engaged in substantial regulation of multiemployer bargaining. While professing a desire to devise rules that will apply uniformly to all parties, the Board has steadfastly held to its position that an impasse in bargaining will not justify withdrawal by an employer from a multiemployer bargaining group. This inflexible position tends to weaken the process of collective bargaining, and seriously interferes with the national labor policy of promoting industrial peace through effective collective bargaining. The stability of multiemployer bargaining is rendered suspect by the Board's slavish adherence to the rules respecting withdrawal rights of the parties. While unions are free to abandon multiemployer bargaining at a critical moment, employers must, under the Board's postulation of the law, remain wedded to the multiemployer group under the same circumstances. Such an unequal policy does much to destroy the integrity of multiemployer bargaining and makes this vehicle for bargaining far less attractive to employers considering entering into, or continuing in, such a framework for collective bargaining in the future.

C. *The Fashioning of an "Impasse Doctrine" by Five Courts of Appeals.*

As a result of the Board's inflexible approach, five circuit courts of appeals[13] have fashioned an "impasse doctrine" holding that an impasse in multiemployer bargaining con-

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[13] In prior decisions the First Circuit indicated approval of the "impasse doctrine." In *NLRB* v. *Field and Sons, Inc.*, 462 F. 2d 748 (1st Cir. 1972), the Board sought enforcement of an order against the employer for violation of § 8(a)(1) and (5) of the Act for refusing to sign a collective bargaining agreement negotiated by a multiemployer bargaining association from which the employer had resigned one week prior to the execution of the collective bargaining agreement. While denying enforcement of the Board's order on procedural grounds, the court stated that, "we do not see

stitutes an "unusual circumstance" within the meaning of the Board's *Retail Associates* decision. *NLRB* v. *Independent Association of Steel Fabricators, Inc.*, 582 F. 2d 135 (2d Cir. 1978); *NLRB* v. *Beck Engraving Company*, 522 F. 2d 475 (3d Cir. 1975), *cert. denied*, 439 U.S. 1130 (1979); *NLRB* v. *Associated Shower Door Co., Inc.*, 512 F. 2d 230 (9th Cir. 1975), *cert. denied*, 423 U.S. 893 (1975); *NLRB* v. *Hi-Way Billboards, Inc.*, 500 F. 2d 181 (5th Cir. 1974); *Fairmont Foods Co.* v. *NLRB*, 471 F. 2d 1170 (8th Cir. 1972); but see *NLRB* v. *Bonanno Linen Service, Inc.*, 630 F. 2d 25 (1st Cir. 1980) (P. 18). In each of these cases, the courts have concluded that a negotiating impasse justifies unilateral withdrawal from a multiemployer bargaining unit. *NLRB* v. *Independent Association of Steel Fabricators, supra* at 146; *NLRB* v. *Beck Engraving, supra* at 482-483; *NLRB* v. *Associated Shower Door, supra* at 232; *NLRB* v. *Hi-Way Billboards, supra* at 183-184; *Fairmont Foods* v. *NLRB, supra* at 1172-1174 n.1.

The first opportunity for judicial review of the Board's rejection of impasse as an "unusual circumstance" came in *Fairmont Foods Co.* v. *NLRB*, 471 F. 2d 1170 (8th Cir. 1972). In that case, the Court of Appeals for the Eighth Circuit considered the issue as to whether a valid impasse justified the employer's unilateral withdrawal from group bargaining and stated:

> When an impasse in negotiations is reached, withdrawal by a member of a multiemployer bargaining

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why an undertaking to engage in multi-employer bargaining is an irrevocable agreement under all circumstances." *Id.* at 750. And in *Jaime Andino d/b/a Jaime Andino Trucking* v. *NLRB*, 619 F. 2d 147, 151 (1st Cir. 1980), the First Circuit, citing *Carvel Co.* v. *NLRB*, 560 F. 2d 1030, 1035 (1st Cir. 1977), and *Fairmont Foods Co.* v. *NLRB*, 471 F. 2d 1170, 1172-1173 (8th Cir. 1972), while finding that no impasse had been reached, stated that an impasse is an unusual circumstance justifying withdrawal, *supra* at 151.

> group is excused. *See* Morand Bros. Beverage Co., 91 N.L.R.B. 409, 26 L.R.R.M. 1501, 1506 (1950), enforced, 190 F. 2d 576 (7th Cir. 1951); *cf.* Ice Cream Council, Inc., 145 N.L.R.B. 865, 870, 55 L.R.R.M. 1059, 1061 (1964). This means, of course, that it cannot be bound by a subsequent agreement between a union, having knowledge of the withdrawal, and the other employers. *Id.* at 1172-1173.

The court went on to say that "[b]ecause an impasse had been reached, Fairmont's withdrawal was timely. It therefore was not a violation of 8(a)(5) and (1) of the Act to refuse to be bound by an agreement reached by the Union and the multiemployer group after withdrawal with the Union's knowledge." *Id.* at 1173. Thus, in essential terms, it may be said that *Fairmont Foods, supra,* stands for the proposition that a member of a multiemployer unit may withdraw from that bargaining unit when an impasse is reached in negotiations.

NLRB v. *Hi-Way Billboards, Inc.,* 473 F. 2d 649 (5th Cir. 1973) deals directly with the issue of whether an employer may unilaterally withdraw from group bargaining because of an impasse in negotiations.

On a petition for enforcement of the Board's bargaining order, the court concluded that a "genuine impasse in the bargaining was reached by the Association and the Union immediately prior to the Company's withdrawal from the multiemployer bargaining unit," 473 F. 2d at 655, and remanded the case to the Board "so that it may be given the first opportunity to decide whether an impasse such as found here excuses the Company from withdrawing from the multiemployer bargaining unit." *Id.* at 655.

On remand, 206 NLRB 22 (1973), the Board discussed the issue of impasse and concluded for the first time that "an employer may not unilaterally withdraw from a multi-

employer bargaining unit solely because an impasse in negotiations has been reached." *Id.* at 22. The Board then cited *Retail Associates, supra,* as controlling and held that "a genuine impasse in negotiations between a union and a multi-employer bargaining association does not constitute an 'unusual circumstance' within the meaning of that term as applied by us in cases subsequent to *Retail Associates.*" *Id.* at 23. The Board went on to reaffirm its original order.

The Board once again petitioned the U.S. Court of Appeals for the Fifth Circuit for enforcement of its order. *NLRB* v. *Hi-Way Billboards, Inc.,* 500 F. 2d 181 (5th Cir. 1974). In denying enforcement of the Board's order, the court of appeals discussed the essential inequality of bargaining rights that has resulted from the uneven application of the Board's rules governing withdrawal from multiemployer bargaining. The court concluded that the union had an unfair advantage in multiemployer negotiations by reason of the fact that the Board permitted unions to enter into an agreement with one member of an employers' association and then to whipsaw the remaining members of the multiemployer bargaining unit. The court determined that "enforcement of the Board's order would be unfair to the Company." *Id.* at 184.

The next case to discuss this issue was *NLRB* v. *Associated Shower Door Co., Inc.,* 512 F. 2d 230 (9th Cir. 1975), *cert. denied,* 423 U.S. 893 (1975). The facts, stated briefly, are as follows: During the course of negotiations over a new contract, the multiemployer bargaining association and the union reached an impasse. The union then notified the association that it was going to strike. Subsequently, the company informed the association that it was withdrawing, but did not inform the union of the withdrawal. Two weeks later, the company sent telegrams to both the association and the union stating that it was withdrawing from the association. Shortly thereafter the union informed the association that it

was not accepting the company's withdrawal. The union then sent a letter to the company stating that it did not consent to its withdrawal from multiemployer bargaining and that the company would be bound by any agreement entered into by the association and the union. The company continued its participation in the multiemployer negotiations. An agreement was reached between the association and the union, but the company refused to comply with said contract, relying upon its purported withdrawal from the association.

In its decision reviewing the Board's finding of a § 8(a)(5) violation, the Ninth Circuit addressed itself to the Board's position that the company's withdrawal was ineffective because once collective bargaining involving a multiemployer unit has begun, neither the employer group nor an individual employer nor the union may withdraw from such bargaining without the consent of the opposing party, absent unusual circumstances. In adopting a position contrary to that of the Board, the court reasoned as follows:[14]

> The Board has held that a union which has commenced collective bargaining with a multi-employer unit may withdraw from the multi-employer unit with respect to one or more employers while continuing multi-employer bargaining with those employers remaining in the multiple unit. Pacific Coast Association of Pulp and Paper Manufacturers, 163 N.L.R.B. 892, 895-896 (1967). Since the Board has committed itself to preserving the equality of withdrawal rights in the multi-employer unit situation, *see* The Evening News Association, 154 N.L.R.B. 1494,

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[14] The court, however, ordered enforcement of the Board's order on the grounds that though the employer's withdrawal was effective when tendered, the subsequent conduct of the parties (i.e., participating in further multiemployer negotiations) constituted a retraction of the withdrawal and a reestablishment of the bargaining unit.

> 1495-1497 (1965), enforced sub. nom. Detroit Newspaper Publishers Association v. NLRB, 372 F.2d 569, 572 (6th Cir. 1967), it seems only fair that, when an impasse is reached and a union then engages in selective picketing and enters into substantial individual agreements with employers who had been members of the multi-employer unit, the withdrawal of the remaining members of the unit, if unequivocally communicated, should be permitted. [Citations omitted.]
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> *Were the rule otherwise, a union could reach an agreement with one or more employers and then whipsaw the remaining members of the significantly fragmented and weakened multi-employer unit.* [Citations omitted.] Here the Companies were entitled to, and did by clear written notice, withdraw from the Association. *Id.* at 232 (emphasis added).

The Third Circuit has also concluded, on facts substantially similar to those in the instant case, that once an impasse in multiemployer bargaining has been reached, withdrawal is allowed. *NLRB* v. *Beck Engraving Co., Inc.*, 522 F. 2d 475 (3d Cir. 1975). The specific issue addressed by the Third Circuit was whether an impasse in contract negotiations is an "unusual circumstance" which justified the withdrawal of a company from a multiemployer bargaining association. The Board argued, in accordance with its recent decisions, that the "unusual circumstances" exception should be limited to two situations: (1) extreme financial hardship threatening the existence of the employer as a viable business entity; and (2) fragmentation or dissipation of the multiemployer bargaining unit. The Board contended that neither of these situations existed in the *Beck* matter. The court did not agree with the Board's contention, and concluded that the "unusual cir-

cumstances" exception should not be so limited. In so concluding, the *Beck* court reasoned as follows:[15]

> As we have noted, the Board has enunciated the even-handed principle that its regulations for withdrawal from multi-employer bargaining units are the same for unions and employers. *The Evening News Association, supra,* 154 N.L.R.B. at 1501 (1965). Its subsequent decisions have reflected an effort to effectuate this policy. For example, the Board has held in a series of opinions that a union may withdraw from a multi-employer bargaining unit with respect to one or more, but not all, employers if the withdrawal is timely and unequivocal. *Pacific Coast Association,* 163 N.L.R.B. No. 129, pp. 892-899 at 896 (1967); *Hearst Consolidated Publications, Inc.,* 156 N.L.R.B., No. 16, 210, 212 (1965) enforced *sub nom., Publishers' Association of New York City v. NLRB,* 364 F.2d 293 (2d Cir.), cert. denied 385 U.S. 971, 87 S.Ct. 509, 17 L.Ed.2d 435 (1966); *The Evening News Association,* 154 NLRB No. 121, 1494, 1501 (1965), enforced *sub nom., Detroit Newspaper Publishers Association v. NLRB,* 372 F.2d 569, 572 (6th Cir. 1967). In substance, these cases merely apply the *Retail Associates* rule, *supra,* 120 NLRB 393-395, to the union as well as the employer.
>
> But the Board has not contented itself with this approach. Instead, it has given its imprimatur to the union's negotiation of interim, separate agreements with individual members of the multi-employer bargaining unit. *P.H.C. Mechanical Contractors,* 191 NLRB No. 121, pp. 592-596 (1971); *Sangamo Construction Company,* 188 NLRB No. 26, 159-163 (1971). *The undeniable import of this policy is that the union may reach*

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[15] *NLRB* v. *Beck Engraving Co., Inc.,* 522 F. 2d 475, 482-483 (3d Cir. 1975).

agreements with one or more employers of the bargaining unit and then whipsaw the remaining employers of the bargaining unit.

It is not sufficient to say, as the Board does, that such an arrangement does not preclude an individual employer from reaching an individual and interim accord with the union. Rather, the point is that each individual agreement strengthens the union's hand vis-a-vis those employers who continue to bargain within the unit. Moreover, allowing individual negotiations even on an interim basis is tantamount to a rejection of the existence of the multi-employer bargaining unit. *We believe it inconsistent to say that the union and some employers may act on an individual basis while other employers within the same unit, relegated to this posture by the union's refusal to negotiate with them on an individual basis, must adhere to group bargaining.* The union, under the Board's own policy, should not have been given two weapons for its economic arsenal (i.e., the selective strike and individual negotiations) while the employers are given only one (viz., the lockout). *We believe that the Board's approval of individual, interim agreements during multi-employer bargaining and without requiring withdrawal from the multi-employer bargaining unit is sufficient cause for according the employer an equivalent right.* See *Fairmont Foods Co. v. NLRB, 471 F.2d 1170 at 1174, n.1 (8th Cir. 1972). Moreover, the Board's decisions and its stated policy of applying its rules equally to both Union and employer require us also to conclude that a negotiating impasse justifies an employer's unilateral withdrawal from the multi-employer bargaining unit.*

We, therefore, join the Ninth, Fifth, and Eighth Circuits and hold that a negotiating impasse justifies unilateral withdrawal from a multi-employer bargaining

unit, *NLRB v. Associated Shower Door Co., Inc.*, 512 F.2d 230 at 232 (9th Cir. 1975), petition for cert. filed, 44 U.S.L.W. 3062 (U.S. July 23, 1975) (No. 75-127); *NLRB v. Hi-Way Billboards, Inc.*, 500 F.2d 181 at 183-184 (5th Cir. 1974); . . . *Fairmont Foods Co. v. NLRB, supra* at 1172-1173 and 1174, n.1. (Emphasis added.)

In *NLRB* v. *Independent Association of Steel Fabricators, Inc.*, 582 F. 2d 135 (2d Cir. 1978), the Board, on appeal to the Second Circuit for enforcement of its bargaining order, argued essentially that no impasse existed when the employer withdrew from multiemployer bargaining. The Board further argued that an impasse in bargaining is merely a "hiatus in negotiations" and is not such an unusual circumstance within the meaning of its *Retail Associates, supra,* decision. The court, joining the four other circuit courts which had decided the issue, disagreed with the Board, holding that an impasse was in fact present, and such an impasse constitutes special circumstances justifying an employer's withdrawal from multiemployer bargaining. In so doing the court recognized the substantial deleterious effect the unchecked power of a union to negotiate individually with members of a multiemployer unit has on the continuing viability of the multiemployer group. Absent the employer's concomitant ability to withdraw from multiemployer bargaining upon impasse, the court adeptly pointed out the adverse consequences on the multiemployer unit which follow when the union engages in individual bargaining. "[I]ts [the union's] willingness to negotiate separately with several members had something of a whipsaw effect on the remaining members who watched certain of their withdrawing competitors resume business while they themselves were still in the throes of an economic strike." 582 F. 2d at 147.

The Second Circuit therefore joined the four other circuit courts in holding that an impasse in bargaining constitutes such an unusual circumstance as to justify unilateral with-

drawal by an employer from a multiemployer unit. In reaching this conclusion the Second Circuit said:

> In this circuit, we have never directly ruled on an actual impasse situation as it affects the withdrawal rights of a member of a multi-employer bargaining unit. . . . The policy considerations involved are easy to formulate but difficult to reconcile. The rule against untimely withdrawal is designed to preserve the stability of multi-employer bargaining which would be impaired if an employer could withdraw whenever it found the results of such bargaining uncongenial or if it felt that it could use the threat of withdrawal as bargaining leverage. *See N.L.R.B. v. Sheridan Creations, Inc., supra,* 357 F.2d at 248. By the same token, however, the objectives of collective bargaining would be ill-served by compelling employers to remain in the bargaining unit once it becomes clear that no progress is being made within that framework. Thus, all the circuits which have addressed the issue have concluded that a genuine impasse in negotiations will justify an employer's unilateral withdrawal from multi-employer bargaining. 582 F.2d at 146 (citations omitted).

A recent decision of the Ninth Circuit, on the issue, was rendered in *H & D, Inc.* v. *NLRB,* — F. 2d — (9th Cir. October 8, 1980). In this decision the court adhered to its earlier holdings that an impasse in bargaining justifies employer withdrawal. The court stated:

> Recently, this court declared in *Authorized Air Conditioning Co.* v. *NLRB,* 606 F. 2d 899 (9th Cir. 1979), citing cases from the Second, Third, Fifth, Eighth and Ninth Circuits, that "[t]he Courts of Appeals have consistently recognized an impasse in negotiations as justification for a unilateral withdrawal from a multi-employer

unit." 606 F. 2d at 907. While the Board argues on this appeal that its position, considering the competing policy decisions is compelling and entitled to judicial acceptance, and that in recent cases the courts' misconceptions of the Board's rulings have been clarified, these contentions are not persuasive and appear to be disposed of in *NLRB* v. *Associated Shower Door Co.*, 512 F. 2d 230, 232 (9th Cir. 1975), and *NLRB* v. *Beck Engraving Co.*, 522 F. 2d 475 (3d Cir. 1975). We find no cogent reason at this time to challenge the position taken by this court in *Authorized Air Conditioning Co.* v. *NLRB, supra* at 907-908.

Thus, all of the courts of appeals which have considered the question, with the notable exception of the First Circuit, have concluded that the Board's refusal to view an impasse as an "unusual circumstance" is unsound. Rather, these courts have fashioned an impasse doctrine which adequately protects the rights of all parties bargaining in a multiemployer context. Just as the Board originally granted a union the right to withdraw after an impasse in bargaining in order to give it equal rights *vis-a-vis* the employer, *Morand Brothers Beverage Co.*, 91 NLRB 409 (1950), *enf'd*, 190 F. 2d 576 (7th Cir. 1951), the judiciary, with the exception of the First Circuit, has found it necessary, in balancing the equities, to grant the employer the right of withdrawal at impasse, to insure equality vis-a-vis the union. See *NLRB* v. *Bonanno*, 630 F. 2d 25, 30 n.7 (1st Cir. 1980) (P. 26).

D. *The Labor Board's Notion that an Impasse in Bargaining Is Not an "Unusual Circumstance," as Enforced by the First Circuit, Is Not Supported by the Realities of Multiemployer Bargaining.*

The Board's view, as supported by the First Circuit below, that an impasse is not an "unusual circumstance" under its

Retail Associates decision does not comport with the realities of multiemployer collective bargaining, and has the practical effect of jeopardizing the viability and effectiveness of bargaining on a group basis. While the Board professes a desire to apply its rules regarding withdrawal equally to employers and unions, *The Evening News Association*, 154 NLRB 1494 (1965), *enf'd sub nom. Detroit Newspaper Publishers Association* v. *NLRB*, 372 F. 2d 569 (6th Cir. 1967) *Hearst Consolidated Publications, Inc.*, 156 NLRB 210 (1966), *enf'd*, 364 F. 2d 293 (2d Cir. 1966), *cert. denied*, 385 U.S. 971 (1966); *Pacific Coast Association*, 163 NLRB 892 (1967), equal treatment is denied by the Board's sanction of a union's right to negotiate separate interim agreements with individual employer members of a multiemployer group. *Sangamo Construction Co.*, 188 NLRB 159 (1971); *Plumbers and Steamfitters Union No. 323* (P.H.C. Mechanical Contractors), 191 NLRB 592 (1971). Moreover, the Board's conclusions with respect to the impact of an impasse in negotiations on multiemployer bargaining do not consider the practical effects of such an occurrence on the dynamics of group bargaining.

As set forth above, the Board has stated that, once negotiations have begun, a union may withdraw from multiemployer bargaining with respect to one or more employers, while continuing multiemployer bargaining with those employers remaining in the group. *Pacific Coast Association*, 163 NLRB 892 (1967); see also *NLRB* v. *Hi-Way Billboards, Inc.*, 500 F. 2d 181, 183 (5th Cir. 1974); *NLRB* v. *Bonanno*, 630 F. 2d 25, 31 n. 10 (1st Cir. 1980) (P. 28). Such a policy unfairly tips the delicate balance existing in multiemployer bargaining in favor of a union and represents a significant departure from the Board's ostensible equality of withdrawal standard. By adopting such a policy the Board creates an imbalance of

economic weapons contrary to this Court's decision in *NLRB* v. *Brown*, 380 U.S. 278 (1965).[16]

This policy protects the interests of the union but is inequitable to employers. On the one hand, the Board sanctions the right of a union to, in effect, reject the existence of the multiemployer bargaining unit. On the other hand, however, the employer is held, without choice, to be bound by the results of the multiemployer bargaining. "The policy of the Board does tend to favor the union. The Board apparently sees these interim agreements as a legitimate bargaining weapon that the union may resort to without creating new withdrawal rights in the remaining employers, so long as the agreements are not so numerous that the multi-employer group becomes completely fragmented." Murphy, *Impasse and the Duty to Bargain in Good Faith,"* 39 U. Pitt. L. Rev. 1, 57-58 (1977).

The Board has characterized an impasse in bargaining as only a temporary "deadlock" or "hiatus" in negotiating. *Charles D. Bonanno Linen Service, Inc.*, 243 NLRB No. 140, slip op. at 4 (1979) (P. 41). It therefore concludes, *ipso facto*, that an impasse in bargaining is not an "unusual circumstance" within the meaning of the *Retail Associates* guideline.

The Board's characterization of an impasse in multiemployer bargaining patently ignores the realities on negotiations in this context. It is submitted that an impasse is indeed an "unusual circumstance" in multiemployer bargaining. The Board's limited definition of "unusual circumstance" improperly fails to give due consideration to the

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[16] In *Brown*, this Court concluded that the Labor Board should not be the " 'arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands.' " 380 U.S. at 283.

effects of an impasse in the multiemployer context. In the context of bargaining between a single employer and union, an impasse may be, as the Board contends, only a "temporary deadlock" in negotiations in which each side may use economic force against the other. The union may engage in an economic strike or seek to involve consumers through the use of picketing or handbilling. The employer may hire replacements for its striking employees, or it may seek to transfer work to allies. But in virtually every confrontation of this kind it is the single employer versus the single union.

Conversely, in the multiemployer setting, the frustration of the impasse is exacerbated by the involvement of other competitor employers. The impasse is or may be between employer members of the multiemployer unit as a result of conflicting priorities, as much as between the unit collectively and the union. Moreover, a union's use of interim agreements (as sanctioned by the Board) seriously fractures the group and conflicts with the uniform approach to collective bargaining sought by employers in engaging in bargaining on a group basis. Therefore, once an impasse is reached, each individual employer is confronted not only with its own dispute with the union, but also with conflicting priorities held by other employer members of the multiemployer unit. In addition, the execution of separate agreements by the union whipsaws the remaining employer members, who must, under the Board's view, watch the strike end at competitors' businesses and sustain a competitive disadvantage as those competitors resume business operations. An employer, faced with this two-pronged dilemma, would nonetheless be required by the Board to remain in the multiemployer unit until such time as it is faced with "dire economic circumstances" which threaten its continued existence.

Recognizing the deleterious effects of an impasse on multiemployer bargaining and the Board's inadequate response

thereto, five circuit courts[17] have concluded that an impasse in multiemployer bargaining is in and of itself[18] an "unusual circumstance" thereby justifying unilateral withdrawal. The facts of the instant case are illustrative of the fallacy of the Board's impasse characterization. Thus, the parties reached an impasse in bargaining on May 15, 1975 (P. 56; J.A. 94, Jt. Ex. A, R. 16, 17). Subsequently, the Union engaged in a selective strike against Bonanno commencing on June 23, 1975 (P. 57; J.A. 94, Jt. Ex. A, R. 16, 17). Bonanno endured the continuing impasse for more than six months before effectuating its withdrawal from the Association (P. 58; J.A. 94-95, Jt. Ex. A, R. 16, 17). The impasse continued between the Union and the Association for almost five more months before a collective bargaining agreement was consummated (P. 59-60; J.A. 95, Jt. Ex. A, R. 16, 17). Thus the "temporary hiatus" occasioned by the impasse in bargaining had a duration of almost eleven months. Under these circumstances it

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[17] *NLRB* v. *Associated Shower Door Co., Inc.*, 512 F. 2d 230, 232 (9th Cir. 1975), *cert. denied*, 423 U.S. 893 (1975); *NLRB* v. *Hi-Way Billboards, Inc.*, 500 F. 2d 181, 183-184 (5th Cir. 1974); *Fairmont Foods Co.* v. *NLRB*, 471 F. 2d 1170, 1172-1173, 1174 n.i.g. (8th Cir. 1972); *NLRB* v. *Beck Engraving Co.*, 522 F. 2d 475, 483 (3d Cir. 1975); *NLRB* v. *Independent Association of Steel Fabricators Inc.*, 582 F. 2d 135, 146 (2d Cir. 1978).

[18] The First Circuit asserted that "regardless of the propriety of the analytical approach adopted in *Hi-Way Billboards, Shower Door,* and *Steel Fabricators,* it is apparent that the three decisions hinged on the belief that the negotiation of individual agreements had unfairly tipped the balance of bargaining power, and not on any conviction that impasse alone justifies unilateral withdrawal." 630 F. 2d at 33. Contrary to the First Circuit's decision, none of the circuit court decisions have made the presence of interim agreements a condition precedent to an employer's withdrawal at impasse. See *NLRB* v. *Beck Engraving Co.*, 522 F. 2d 475, 482-483 (3d Cir. 1975); *H & D, Inc.* v. *NLRB*, — F. 2d —, —, 105 LRRM 3070, 3072 (9th Cir. 1980). The Board itself admitted as much in its Supplemental Decision in the instant case. *Charles D. Bonanno Linen Service, Inc.*, 243 NLRB No. 140, slip op. at 7 (P. 39-40, n.5).

cannot be reasonably claimed by the Board that the impasse was merely a temporary "hiatus" or "deadlock" which can be easily manipulated by either party. *Charles D. Bonanno Linen Service, Inc.*, 243 NLRB No. 140 (1979), slip op. at 4 (P. 41).

Under the Board's rationale, Bonanno would have been required to endure, without any viable alternative, an impasse of almost eleven months duration,[19] as well as the possibility that the separate meetings between the Union and individual members of the Association might result in separate agreements of potentially damaging effect. Under the circumstances the only equitable alternative available to Bonanno was withdrawal from group bargaining. To require Bonanno to continue as a member of the Association until such time as it could no longer continue as a viable business entity[20] would hardly be in keeping with our national labor policy of reducing "industrial strife" and providing peaceful resolution of labor disputes. 29 U.S.C. § 141.

The Board's conclusion that impasse does not constitute an "unusual circumstance" is further weakened by its authorization of separate interim agreements between a union and individual employer members of a multiemployer group.[21] The

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[19] That is, assuming that the impasse would have been broken at that time had Bonanno not removed itself from the group negotiation. It is, of course, not possible at this time to assess the effect of Bonanno's withdrawal on the bargaining climate and its impact on the logjam in negotiations which existed at that time.

[20] In effect, the Board would require Bonanno to face bankruptcy before being permitted to withdraw. Of what avail then would be the right of withdrawal?

[21] See, e.g., *NLRB* v. *Hi-Way Billboards, Inc.*, 500 F. 2d 181, 183 (5th Cir. 1974); *NLRB* v. *Beck Engraving Co.*, 522 F. 2d 475, 482-483 (3d Cir. 1975); *NLRB* v. *Independent Association of Steel Fabricators*, 582 F. 2d 135, 147 (2d Cir. 1978); *NLRB* v. *Associated Shower Door Co.*, 512 F. 2d 230, 232 (9th Cir. 1975). Even the First Circuit below recognized the adverse impact of separate agreements on the stability of multiemployer bargaining. The court

Board has held that a union which is engaged in multiemployer negotiations may engender a *de facto* withdrawal from the multiemployer unit by entering into separate agreements with one or more members of the multiemployer group. At the same time the union can insist on bargaining with the remaining employers on a multiemployer basis.

Negotiation of such agreements, according to the Board, prevents significant fragmentation, rather than causes it, and tends to facilitate the breaking of an impasse (P. 51). However, the substantial injurious effect of separate agreements has been well recognized by the courts of appeals. The practical effect of separate agreements on the viability of the multiemployer group was described by one commentator as follows:[22]

> The ability to negotiate interim agreements with weaker members of the association results in a "whipsawing" of those members which the union refused to bargain with. These remaining employers have no parallel means of fragmenting the union[12] but are subject to being isolated and thus further pressured into acquiescing to the union in negotiations. . . .
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> While it is true that the interim agreements help break the negotiating logjam, they do so by increasing the pressure on the resisting employers, a tactic for which the employers, practically speaking, have no counterweight. In most cases, the employers not signing interim agree-

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stated that "[w]ithdrawal by unit members and their negotiation of separate contracts obviously would reduce the efficiency of the bargaining process." 630 F. 2d at 28.

[22] See also Hickey and Sauntry, *When Is Employer Justified In Leaving The Fold?* Legal Times of Washington, January 5, 1981 at 9-11:

> Under the board's rule, employers who have committed themselves to multi-employer bargaining must watch helplessly while the union picks off its weakest members, destroying the efficiency of multi-employer bargaining. As a practical mat-

ments will be those whose insistence on certain collective bargaining positions has actually resulted in impasse.

Negotiation of interim agreements, even if the signatories thereto are later to be bound by the final agreement, unduly pressures the remaining employers to accede to the union's demand since many times the interim agreements include concessions over and above those the non-signatories are willing to give. Additionally, the signatories of the interim agreements are producing or operating while the isolated members, competitors of the signatories, are still engaged in a work stoppage or labor dispute.

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[12] In fact even where the union is an association or conference board of locals, it would be an unfair labor practice for the employers to attempt to deal with the locals directly. *NLRB* v. *General Electric Company,* 418 F. 2d 736 (2d Cir. 1969). Levin and Jason, *Multiemployer Withdrawal Bid Short Circuited at the Impasse,* 2 National Law Journal No. 24, February 25, 1980 at 25.

Five circuit courts have concluded that the Board's policy is fundamentally inequitable. The courts have found that individual interim agreements have a substantial "whipsaw" effect on the remaining members of the multiemployer unit. Once interim agreements are signed, the multiemployer unit becomes significantly weakened and fragmented. *NLRB* v. *Associated Shower Door, supra.*

Moreover, the Board's suggestion that interim agreements further unit integrity (P. 51) ignores the realities of multiemployer bargaining. And while in many instances these agreements have the effect of breaking an impasse, it is

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ter, they are bound to a bargaining strategy developed on the understanding that they would present a united front to the union and may have made concessions at the bargaining table which might not have been made had the departing employers not been present.

submitted that such a result occurs because one or more employers have abandoned the multiemployer group. By striking separate deals these employers have diminished the strength of the multiemployer group. Further erosion of the group's resolve occurs when the remaining members see one or more competitors, who formerly were allied with them in the multiemployer group, resume their business operation, while they must contend with a continued work stoppage. It is this inequitable situation which the courts have sought to rectify by granting an employer an equivalent right to withdraw upon impasse.

The Board attempts to differentiate between interim agreements which contemplate adherence to a final association-wide contract, and separate agreements, which do not, contending that since signers of interim agreements retain a vested interest in the outcome of final union-association negotiations, the unit is neither fragmented nor significantly weakened (P. 48-49). It is submitted that such an analysis is superficial at best, representing a distinction without a difference. In each circumstance an employer is breaking away from the group to bargain individually with the union. In each instance the employer has struck out on its own, taking positions that are antithetical to those of the multiemployer group. The employer who signs the interim agreement receives immediate benefits that are denied to the remaining members of the multiemployer group who remain enmeshed in a labor dispute with the union. While it is true that employers who sign interim agreements become bound by the agreement ultimately negotiated, it is an inescapable conclusion that the practical effect of their independent actions is to significantly dilute the strength of the multiemployer unit. These employers in effect have, by signing interim agreements with the union, effected a *de facto* withdrawal from the multiemployer group. As the *Beck* court stated: "[A]llowing individual negotiations *even on an interim basis* is tanta-

mount to a rejection of the existence of the multi-employer bargaining unit." 522 F. 2d at 483 (emphasis added).

While there is evidence that the Union, prior to Bonanno's withdrawal, met secretly with two employer members of the Association "presumably in an effort to make a separate settlement" (P. 57), apparently no separate agreements were consummated. Despite the absence of any such agreements this Court is urged to adopt the "impasse doctrine" fashioned by the Second, Third, Fifth, Eighth and Ninth Circuit Courts of Appeals. As the Third Circuit stated in *NLRB* v. *Beck Engraving Co.*, 522 F. 2d 475, 483-484 (3d Cir. 1975),

> The employer's right to withdraw during an impasse cannot be made contingent upon the union's prior exercise of its right to negotiate individual interim agreements. *The rights of the parties should accrue simultaneously based upon the occurrence of an event which neither can manipulate (e.g., impasse).* Were the rule otherwise, the party whose right accrues first would be given a tremendous bargaining advantage and leverage. We recognize that, to some extent, basing the right of withdrawal upon the existence of an impasse rather than of individual negotiations contributes to instability within the context of multi-employer bargaining. Certainly, that is the result in this case. But we cannot avoid the conclusion that this additional incremental instability, however unfavorable to the policy aimed at stabilization of these units, is a necessary concomitant of ensuring that the parties have equal rights and that the existence and implementation of such rights do not grant unfair advantage to either party. (Emphasis added.)

None of the circuit court decisions require the actual execution of interim agreements as a requisite for finding that an impasse in bargaining justifies withdrawal (see footnote 18, *supra*). Accordingly, the absence of any evidence on the

record that interim agreements were entered into herein is immaterial.

In balancing the conflicting legitimate interests of employers and union participants in multiemployer bargaining, and in order to insure that the Board's stated policy of equalizing withdrawal rights of both parties in a multiemployer relationship, this Court should adopt the "impasse doctrine" fashioned by five circuit courts of appeals. Such a decision will have the salutary effect of insuring stability in collective bargaining.

It should be emphasized that multiemployer bargaining is based on consent of the parties. Once a withdrawal is effectuated, bargaining continues on an individualized basis and therefore the purposes of the National Labor Relations Act will continue to be promoted. Labor peace is better served by allowing withdrawals rather than by requiring inflexible adherence to a multiemployer unit long after meaningful collective bargaining within that framework has become nothing more than an exercise in futility.

Bonanno's withdrawal prompted an end to the lockout and subsequently the successful conclusion of an agreement between the Association and the Union. By so withdrawing, Bonanno did not seek to sever its bargaining relationship with the Union. Rather, Bonanno merely sought to meet its obligation under the Act to bargain in good faith on an individual basis. It is submitted that effectuation of collective bargaining would be better served by allowing withdrawal at impasse. The alternative propounded by the Board would frustrate meaningful collective bargaining because it requires an employer to remain indelibly tied to fruitless multiemployer bargaining long after the process of collective bargaining has ceased to function.

II. The Five Courts of Appeals Acted within Their Authority under the National Labor Relations Act and Decisions of This Court in Fashioning the "Impasse Doctrine."

While the decision of the First Circuit below seeks to distinguish the decisions of the five courts of appeals which have fashioned the "impasse doctrine," the court's decision to enforce the Board's order appears to be based upon its view that the Board's rationale is entitled to deference. The court stated:

> Congress "intended to leave to the Board's *specialized judgment* the inevitable questions concerning multi-employer bargaining [which are] bound to arise . . ." *Id.* at 96 [citing *NLRB* v. *Truck Drivers Local 449*, 353 U.S. 87 (1957)]. As a result, the Board's "balancing of the conflicting legitimate interests [is] subject to limited judicial review." *Id.* (footnote omitted). In the present case, we think the Board has struck a reasonable balance in concluding that impasse alone does not justify unilateral withdrawal. 630 F. 2d at 35 (P. 36) (emphasis added) (footnote omitted).

The First Circuit then, essentially concluded that the decision of the Board was entitled to approval out of deference to its presumed expertise. While it is true that judicial review is limited, see, *e.g.*, *NLRB* v. *Truck Drivers Local 449*, 353 U.S. 87, 96 (1957), that does "not mean that the balance struck by the Board is immune from judicial examination and reversal in proper cases." *Labor Board* v. *Brown*, 380 U.S. 278, 290-291 (1965).[23]

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[23] As noted above (p. 10, n.9, and pp. 11-13), the Board's position on the question of impasse has hardly been consistent, thus discounting any claim of expertise superior to that of the circuit courts in balancing the conflicting legitimate interests presented by the instant case.

Congress has mandated that the courts of appeals serve an important role in the development of our federal labor policy. 29 U.S.C. § 160(e) and (f). Under this framework the circuit courts are empowered to enforce, modify, or set aside orders of the Board. In defining the proper role of the courts in cases such as this, which involve a question of law, this Court in *Labor Board* v. *Brown*, 380 U.S. 278, 292 (1965) stated:[24]

> [W]here, as here, the review is not of a question of fact, but of a judgment as to the proper balance to be struck between conflicting interests, "[t]he deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress." *American Ship Building Co.* v. *Labor Board, post*, at 318.
>
> Courts must, of course, set aside Board decisions which rest on an "erroneous legal foundation." *Labor Board* v. *Babcock & Wilcox Co., supra*, at 112-113. Congress has not given the Board untrammeled authority to catalogue which economic devices shall be deemed freighted with indicia of unlawful intent. *Labor Board* v. *Insurance Agents, supra*, at 498.

In the exercise of the mandate of Congress and this Court to give particular scrutiny to Board decisions which, as in this case, "balance conflicting interests" and rest on an "er-

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[24] As this Court held in *NLRB* v. *Weingarten*, 420 U.S. 251 (1975), in cases such as this which involve the balancing of conflicting interests, before the Board's decision is entitled to deference the Board must demonstrate that it "has reached a fair and reasoned balance upon a question within its special competence." *Id.* at 267. It is submitted that the Board's result in this case fails to achieve a reasonable balance of the "conflicting interests of labor and management" with respect to multiemployer bargaining. *Id.*

roneous legal foundation," five circuit courts have determined that an employer should be accorded a right to withdraw at impasse. Those decisions have logically concluded that a balancing of conflicting legitimate interests in the multiemployer bargaining context requires such a result. The Board in the instant case has failed to articulate any valid reason why these decisions are now untenable. Therefore, it is respectfully submitted that the "impasse doctrine" fashioned by five circuit courts (and initially given at least passing acceptance by the First Circuit) should now be adopted by this Court.

Conclusion.

For the reasons set forth above, it is respectfully submitted that the judgment of the court below should be reversed.

Respectfully submitted,

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No. 80-931.

In the

Supreme Court of the United States.

OCTOBER TERM, 1980.

CHARLES D. BONANNO LINEN SERVICE, INC.,
PETITIONER,
v.
NATIONAL LABOR RELATIONS BOARD
AND
TEAMSTERS LOCAL UNION NO. 25,
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS OF AMERICA,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief for the Respondents, Teamsters Local Union No. 25, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

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Question Presented.

Did the First Circuit Court of Appeals properly conclude that an impasse in collective bargaining negotiations alone does not justify unilateral withdrawal by a single employer from multiemployer bargaining?

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Statement of the Case.

The instant matter grows out of a charge filed with the National Labor Relations Board (hereinafter, "the Board") by Teamsters Local Union No. 25, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter, "Local 25"). In that charge, Local 25 asserted that Charles D. Bonanno Linen Service, Inc. (hereinafter "Bonanno"), was engaged in unfair labor practices as defined by Sections 8(a)(5) and (1) of the Act, 29 U.S.C. § 158 (a)(5) and (1) by its refusal to execute the collective bargaining agreement negotiated by Local 25 and the New England Linen Supply Association (hereinafter, "the Association"), a group of ten employers including Bonanno (J.A. 92-93; P. 19-20).*

For some years, Local 25 negotiated collective bargaining agreements with the Association including the agreement that covered the period from September 21, 1972 through April 18, 1975. Throughout these years, Bonanno was a member of the Association for purposes of bargaining with Local 25 (*id.*). On or about February 19, 1975, Bonanno authorized the Association to bargain collectively on its behalf with Local 25 regarding an agreement to replace the agreement which was to expire on April 18, 1975 (*see* J.A. 93; P. 20). Negotiations for a successor agreement began in March of 1975, but by May 15, 1975, the parties reached an impasse on the issue of whether the salaries would be computed on a commission or an hourly basis (J.A. 94; P. 20).

On June 23, 1975, after repeated attempts to break the impasse, Local 25 instituted a selective strike against Bonanno which resulted soon after in the remaining Association em-

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* References marked "J.A." refer to the portions of the record contained in the Joint Appendix while those marked "P." refer to the decisions which are reprinted in the Petition for a Writ of Certiorari.

ployers locking out their union drivers (*id.*). Negotiations continued subsequent to the strike and lockout, and between June 23, 1975 and November 21, 1975, Bonanno, while under the protective umbrella of the lockout, hired permanent replacements for its striking employees (J.A. 94-95; P. 20).

On November 21, 1975, Bonanno, apparently dissatisfied with the strategy proposed by the Association for breaking the impasse (*see* J.A. 38-39, 76-77), notified the Association and Local 25 that it was withdrawing from the Association (P. 20). Local 25 continued to meet with the Association without Bonanno (J.A. 95; P. 21); however, on April 9, 1976, Local 25 filed the unfair labor practice charges out of which the instant controversy has grown. An agreement between Local 25 and the Association was reached on April 13, 1976, based on the union's acceptance of the Association's revised hourly wage offer; and subsequent thereto, Local 25 informed Bonanno by letter dated April 29, 1976, that the union at no time had consented to Bonanno's withdrawal and, therefore, Local 25 considered Bonanno to be a member of the Association and bound by the agreement reached (J.A. 95-96; P. 21).

The instant case originally came before the First Circuit Court of Appeals pursuant to an application of Bonanno under Section 10(f) of the National Labor Relations Act (hereinafter, "the Act"), 29 U.S.C. § 160(f), for review of the initial decision and order of the Board, 229 NLRB 629 (1977) (P. 53-71). Subsequent to the docketing of said application, the Board, *sua sponte*, decided to review and to reconsider the issues raised in this case and was granted leave by the First Circuit to withdraw the certified list. On August 6, 1979, the Board issued its Supplemental Decision and Order, 243 NLRB No. 140, and, thereafter, applied under Section 10(e) of the Act with the First Circuit for enforcement of that Decision and Order.

Summary of Argument.

Multiemployer bargaining, in certain contexts, is beneficial to both companies and unions and, more importantly, has been recognized by Congress as an effective means of achieving labor peace. However, since it is based, to a certain extent, on sacrifice and compromise, it is a fragile concept that will be abandoned by both sides if the benefits of same cannot be ensured through the severe restriction of nonconsensual withdrawals.

An impasse is an expected, commonplace and temporary part of collective bargaining negotiations. As such, linking nonconsensual withdrawal rights to the existence of an impasse would result in the Board's "unusual circumstances" exception to nonconsensual withdrawal subsuming the rule of nonconsensual withdrawal. Moreover, an impasse can be manipulated with the result that allowing withdrawal at impasse would sanction unfettered withdrawal rights, even though such rights clearly are antithetical to multiemployer bargaining.

In application, this Court's judicial review standards in cases involving multiemployer bargaining issues require that a reviewing court first determine the propriety of the legal foundation upon which the decision of the Board is based, and, thereafter, give the appropriate deference to the judgment of the Board unless that foundation is found to be erroneous.

As applied to the facts of the instant case, the Board was balancing (1) the preservation of the viability of multiemployer bargaining, since it perceived correctly that such bargaining, as a practical matter, would be destroyed if members of the unit were free to withdraw upon a bargaining impasse, and (2) what was viewed by the Third Circuit in *NLRB* v. *Beck Engraving Co.*, 522 F.2d 475 (3d Cir. 1975), as an im-

balance of economic weapons. The Board, of course, struck the balance in favor of preserving the integrity of multiemployer bargaining, especially since this Court has admonished both the Board and the courts to refrain from becoming arbiters of the economic weapons which parties may use in seeking to gain acceptance of their bargaining demands. In any case, it is evident that the balance struck by the Board was based on a sound legal foundation and, as such, was entitled to deference.

Finally, as presently articulated, only the decision of the Third Circuit in *Beck* is inconsistent with that of the First Circuit below. However, the *Beck* decision is suspect as the court (1) makes itself an arbiter of economic weapons, (2) engages in a balancing of so-called "economic weapons" which is extremely imprecise, and (3) misperceives a bargaining impasse as an event which neither side can manipulate. Moreover, the Third Circuit in *Beck* has usurped impermissibly the Board's function of balancing conflicting interests.

Accordingly, while the decision of the First Circuit below is analytically sound, its counterpart in the Third Circuit is neither persuasive nor consonant with the appropriate standard of review.

Argument.

I. The First Circuit Court of Appeals Properly Concluded that an Impasse in Collective Bargaining Negotiations Alone does Not Justify Unilateral Withdrawal by a Single Employer from Multiemployer Bargaining.

Multiemployer bargaining has existed at least since the early 1800's when it was prominent in the anthracite coal industry.[1]

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[1] Pierson, *Multi-Employer Bargaining: Nature and Scope*, 8 (1949).

This type of bargaining increases the economic leverage of small businessmen and permits them to conserve scarce economic resources.[2] Moreover, as this Court has pointed out, multiemployer bargaining enables smaller employers to bargain "on an equal basis with a large union" and to avoid "the competitive disadvantages resulting from nonuniform contractual terms." *NLRB* v. *Truck Drivers Local 449*, 353 U.S. 87, 96 (1957).[3] In addition, multiemployer bargaining is an effective means of counteracting the potential use by unions of whipsaw tactics.

Thus, without multiemployer bargaining, a union which represents the employees of a number of competing employers in a particular geographic region could strike a single employer while permitting that employer's competitors to continue to operate. However, in a multiemployer bargaining setting, the potential use of whipsaw tactics by the union is thwarted, since the nonstruck members of the bargaining association can lock out their employees, *see NLRB* v. *Truck Drivers Local 449*, 353 U.S. at 97, and all members of the association can hire temporary replacements for their struck or locked-out employees. *See NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345 (1938); *NLRB* v. *Brown*, 380 U.S. 278, 283 (1965).

Conversely, multiemployer bargaining permits a union to conserve its own scarce resources as well as effectuates a standardization of wages, benefits and working conditions within an industry.[4] Moreover, multiemployer bargaining facilitates

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[2] Herold, *Multiemployer Bargaining And The Whipsaw Strike: The Use Of A Lockout As An Economic Weapon*, 21 Brooklyn Bar. 54, 54-55 (1969).

[3] As one commentator has noted, multiemployer bargaining has become a defensive technique for small businessmen against the demands of strengthened unions. Comment, 66 Harv. L. Rev. 886, 886-887 (1953).

[4] Herold, *Multiemployer Bargaining And The Whipsaw Strike: The Use Of A Lockout As An Economic Weapon*, 21 Brooklyn Bar. 54, 54-55 (1969); Comment, 66 Harv. L. Rev. 886, 887 (1953).

the adoption of industry-wide benefits such as jointly-managed pension and welfare plans (*see* P. 21). Accordingly, multiemployer bargaining, in certain contexts, clearly is favored by both labor and management.

More importantly, multiemployer bargaining, as noted by this Court, *see NLRB* v. *Truck Drivers Local 449*, 353 U.S. at 95, has been recognized by Congress as "a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining." Thus, during the Taft-Hartley amendments debate, Congress extolled the virtues of multiemployer bargaining, stating at one point the following:

> Because numerous employers are covered by a single collective bargaining agreement, less time is lost in the bargaining process. Settlements are made simultaneously for these employers rather than on an individual employer-by-employer basis. Industrial peace is achieved in one step rather than over a prolonged period of time. Bargaining with hundreds of individual firms for the same things is both wasteful and unfair to both sides.

93 Cong. Rec. 4030-4031 (1947) (remarks of Senator Murray).

However, the continued vitality of multiemployer bargaining rests on the willingness of the Board and the courts to restrict severely the rights of parties to withdraw from such bargaining once undertaken.[5] "From the standpoint of a

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[5] As the Sixth Circuit stated in *Detroit Newspaper Publishers Assoc.* v. *NLRB*, 372 F.2d 569, 572 (6th Cir. 1967):

> Thus, while fear of being "locked in" a unit might discourage entrance by a union as the Board has argued, it must be equally clear

participating employer, it is crucial that the multiemployer group be held together. Otherwise, the goal of multiemployer bargaining will be defeated."[6] Similarly, it is critical to the union that the multiemployer group be maintained, since it has sacrificed certain economic leverage to obtain standardized benefits.

In this regard, a union, absent multiemployer bargaining, can exert crippling leverage on a single employer by striking that employer while permitting his competitors to continue to operate. The union, however, relinquishes this leverage when it consents to multiemployer bargaining, since the association members, by employing such techniques as the lockout, may operate as a group to ensure that none of its members are placed in a competitive disadvantage if the union engages in selective strikes. In turn, a businessman gives up certain elements of his economic independence to obtain protection from potential whipsaw tactics by the union and to ensure ultimate competitive wage and benefit parity. Accordingly, since multiemployer bargaining is based, to a certain extent, on sacrifice and compromise, it is a fragile concept that will be abandoned by both sides if the benefits of same cannot be ensured.

For example, a union, in the context of multiemployer bargaining, engages in a selective strike against one member of the association after a bargaining impasse has been reached. The other association members, as businessmen, most likely would choose to continue to operate with their normal work-

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that a virtually unfettered right of withdrawal, even if available to both sides in parity, might also destroy the attractiveness of such arrangements. The Board might well find that the instability resulting from such conditions has undermined the multi-employer unit as an effective tool of labor relations.

[6] Murphy, *Impasse And The Duty To Bargain In Good Faith*, 39 U. Pitt. L. Rev. 1, 50 (1977).

force. However, the other association members nevertheless choose to lock out their union employees to ensure the integrity of the multiemployer unit by protecting the competitive position of the struck member. The result is that the union's potential economic leverage is minimized or eliminated. Subsequently, the struck member of the bargaining association, while under the protective umbrella of the association-wide lockout, hires permanent replacements for its striking union members and then withdraws from the association with the obvious belief that it can arrive at either a more favorable deal or no deal at all with the union, and with the knowledge that it no longer needs the protections which the association afforded it during the selective strike.

Unquestionably, the above scenario is antithetical to the continued viability of multiemployer bargaining. Thus, despite assuming economic loss to protect a struck member, the nonstruck members of the association have lost bargaining leverage and the prospect of competitive wage and benefit parity within their geographical area. In turn, the union has lost the fundamental bargaining leverage of a strike without obtaining the benefit of standardized wages and benefits. Surely, in light of the above, the parties must be reluctant to engage again in multiemployer bargaining.

Recognizing the inherently fragile nature of multiemployer bargaining and the devastating effect an employer's nonconsensual withdrawal can have on same, the Board in *Retail Associates, Inc.*, 120 NLRB 388 (1958), established restrictive guidelines for withdrawal from a multiemployer bargaining unit. Pursuant to those guidelines, withdrawal by an individual employer or union with respect to one or more employers is allowed prior to the start of negotiations only if adequate written notice is given. Once negotiations begin, a party may withdraw only in cases of mutual consent or "unusual circumstances." The Board's use, in general, of restrictive withdrawal guidelines has enjoyed wide acceptance among the reviewing courts. *See, e.g., Carvel Co.* v. *NLRB*, 560 F.2d 1030

(1st Cir. 1977), *cert. denied*, 434 U.S. 1065 (1978); *NLRB* v. *Paskesz*, 405 F.2d 1201 (2d Cir. 1969); *NLRB* v. *Dover Tavern Owners Assoc.*, 412 F.2d 725 (3d Cir. 1969); *McAx Sign Co.* v. *NLRB*, 576 F.2d 62 (5th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979); *NLRB* v. *Sklar*, 316 F.2d 145 (6th Cir. 1963); *NLRB* v. *Brotherhood of Teamsters, Local No. 70*, 470 F.2d 509 (9th Cir. 1972), *cert. denied*, 414 U.S. 821 (1973); *NLRB* v. *Tulsa Sheet Metal Works, Inc.*, 367 F.2d 55 (10th Cir. 1966).

In applying the "unusual circumstances" exception to the withdrawal prohibition, the Board consistently has permitted nonconsensual withdrawal only when an employer member is experiencing severe economic distress — *see, e.g., Atlas Electrical Service Co.*, 176 NLRB 827 (1969); *Spun-Jee Corp.*, 171 NLRB 557 (1968); *U.S. Lingerie Corp.*, 170 NLRB 750 (1968) — or when consensual employer withdrawals have fragmented the multiemployer unit. *See, e.g., Connell Typesetting Co.*, 212 NLRB 918 (1974).

In the instant case, Bonanno attempted to validate its withdrawal from the Association based on the existence of a bargaining impasse. The Board, however, determined that a bargaining impasse, standing alone, is not an "unusual circumstance" within the meaning of *Retail Associates, Inc.*, and, thus, not an appropriate basis for violating the integrity of the multiemployer unit. This Court is asked herein to determine whether the Board's judgment and decision on the impasse question should be supported.

As such, the instant case implicates two fundamental policy issues. The first issue is whether the decision of the Board, as enforced by the First Circuit Court of Appeals, will effectuate the continued viability of multiemployer bargaining. The second issue is whether the Board's judgment in areas of national labor policy and, particularly, in matters relating to multiemployer bargaining, is entitled to meaningful deference, or whether reviewing courts simply may substitute their judgment for that of the Board under the guise of exercising the limited judicial review permitted by this Court.

A. *The Decision of the National Labor Relations Board, as Enforced by the First Circuit Court of Appeals, will Effectuate the Continued Viability of Multiemployer Bargaining.*

At the outset, it is important to note that the facts of the instant case raise only the question of whether nonconsensual withdrawal rights accrue upon the reaching of an impasse in the context of multiemployer bargaining, and *not* the broader question of whether a party may withdraw from multiemployer bargaining given the existence of both a bargaining impasse and the negotiation of interim agreements. Thus, while the Board (*see* P. 42-51) and the First Circuit, *see* 630 F.2d 25, 30-33 (P. 26-33), discuss an employer's withdrawal rights if interim agreements have been negotiated after a bargaining impasse has been reached, both the Board[7] and the First Circuit[8] found that in the instant case no interim agreements were made or even attempted. Accordingly, for purposes of determining whether the decision of the Board will effectuate the continued viability of multiemployer bargaining, this Court need only address so much of that decision which deals solely with the impact of a bargaining impasse.

An "impasse" has been defined in various ways. For example, as pointed out by the First Circuit below, *see* 630 F.2d at 34 n.24 (P. 35 n.24), an "impasse" is often defined as "a state of facts in which the parties, despite the best of faith, are simply deadlocked." *NLRB* v. *Tex-Tan, Inc.*, 318 F.2d 472, 482 (5th Cir. 1963). Similarly, an "impasse" has been defined as a situation in which "there was no realistic possibility that continuation of discussion at that time would have been fruit-

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[7] The Board found that "[i]n the instant case no interim agreements were made or even attempted" (P. 51).

[8] The First Circuit ruled that the negotiation of individual agreements "is absent in the present case; as the Board stated, 'no interim agreements were made or even attempted.'" 630 F.2d at 33 (P. 33); *see also* Circuit Judge Campbell's concurrence at 630 F.2d at 35 (P. 37).

ful." *Television Artists, Kansas City Local* v. *NLRB*, 395 F.2d 622, 628 (D.C. Cir. 1968).

However defined, it is evident that an impasse must be viewed as an expected part of negotiations especially in times of slow economic growth. Moreover, it is clear that the statutory duty to bargain in good faith does not require a party "to engage in fruitless marathon discussions at the expense of frank statements and support of his position." *NLRB* v. *American Insurance Co.*, 343 U.S. 395, 404 (1952). As a result, an impasse is not only an expected part of the negotiation process, but also often is arrived at early in that process. *See, e.g., Memorial Consultants, Inc.*, 153 NLRB 1, 15 (1965) (impasse reached at second meeting of the parties); *Midwest Casting Corp.*, 194 NLRB 523, 524-532 (1971) (impasse reached after one month and five meetings). Furthermore, as one commentator has stated, an impasse is "a fragile condition which may easily expire."[9]

Accordingly, linking a party's withdrawal rights to a common and temporary stage in normal collective bargaining would result in the "unusual circumstances" exception to the nonwithdrawal rule subsuming that rule and would make nonconsensual withdrawals from multiemployer bargaining commonplace. Since, as noted *supra*, the stability of multiemployer bargaining rests, in large part, on maintaining the integrity of the multiemployer group, the Board's refusal to permit nonconsensual withdrawal at impasse can only be viewed as effectuating the Congressional policy of continuing the viability of multiemployer bargaining.

In addition, a bargaining impasse not only is commonplace, but also clearly may be manipulated and created by an employer or union simply by the party's remaining steadfast in a position which is known to be unacceptable to the other party.[10] As stated by the First Circuit below, since "the Act

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[9] Murphy, *Impasse And The Duty To Bargain In Good Faith*, 39 U. Pitt. L. Rev. 1, 17 (1977).

[10] *See* Comment, 17 B.C. Indus. & Comm. L. Rev. 525, 539-540 (1976).

expressly provides that the 'obligation [to bargain collectively] does not compel either party to agree to a proposal or require the making of a concession[,]'" it is "within the power of an employer or union in many cases to cause a stalemate, as by adhering to a position known to be unacceptable to the other side." 630 F.2d at 34 (P. 35; citation omitted.) Thus, the practical effect of allowing withdrawal at impasse would be to sanction unfettered withdrawal rights — a policy which long ago was rejected by the Board as antithetical to the national policy of promoting multiemployer bargaining.

Finally, since the existence of an impasse depends on such varying factors as "[t]he bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, [and] the contemporaneous understanding of the parties as to the state of negotiations," *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), *enforced*, 395 F.2d 622 (D.C. Cir. 1968), the determination of same is imprecise and time-consuming. As such, tying the right of withdrawal to impasse "can only lead to confusion concerning the rights of the parties," 630 F.2d at 34-35 (P. 35), and a concomitant reluctance by both businessmen and unions to engage in multiemployer bargaining.

In sum, maintenance of the integrity of multiemployer bargaining can only be achieved by severely restricting the nonconsensual withdrawal rights of the parties thereto. Permitting nonconsensual withdrawal at impasse would remove, in large part, any practical restrictions on a party's right to withdraw from multiemployer bargaining. Accordingly, since multiemployer bargaining has been recognized by Congress as "a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining," *NLRB* v. *Truck Drivers Local 449*, 353 U.S. at 95, the Board's decision herein is consonant with Congressional policy and should be enforced.

B. *The First Circuit Court of Appeals Gave Appropriate Deference to the Policy Judgment Made by the National Labor Relations Board.*

This Court historically has recognized that the rights and responsibilities of employees, employers, and unions under the Act often must be determined through the process of balancing "conflicting legitimate interests." *NLRB* v. *Truck Drivers Local 449*, 353 U.S. at 96. In addition, this Court has stated that the "function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board subject to limited judicial review." *Id.*, *citing NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956); *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793 (1945); *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177 (1941).

This principle of judicial deference has been extended specifically by this Court to problems or questions arising in the context of multiemployer bargaining. Thus, this Court in *NLRB* v. *Truck Drivers Local 449*, 353 U.S. at 96, stated the following:

> . . . the compelling conclusion is that Congress intended "that the Board should continue its practice of certifying multi-employer units, and intended to leave to the Board's specialized judgment the inevitable questions concerning multi-employer bargaining bound to arise in the future." (Citations omitted.)

This Court, however, has emphasized that a Board decision should be reviewed and set aside if the Board has usurped "major policy decisions properly made by Congress," *NLRB* v. *Brown*, 380 U.S. at 292, *quoting American Ship Building Co.* v. *NLRB*, 380 U.S. 300, 318 (1965), with the result that its decision rests on an "erroneous legal foundation." *NLRB* v. *Brown*, 380 U.S. at 292, *quoting NLRB* v. *Babcock & Wilcox*, *supra*. Accordingly, the application conceptually of this

Court's judicial review standards in cases involving multiemployer bargaining issues requires that a reviewing court first determine the propriety of the legal foundation upon which the decision of the Board rests, and, thereafter, give the appropriate deference to the judgment of the Board unless that foundation is found to be erroneous, since Congress has entrusted to the Board the primary responsibility for balancing the legitimate conflicting interests which arise in the context of labor-management relations. The functional application of these judicial review standards is illustrated clearly by *NLRB* v. *Truck Drivers Local 449* and *NLRB* v. *Brown*.

In *Buffalo Linen Supply Co.*, 109 NLRB 447 (1957), the union alleged that the lockout of the union employees by the nonstruck members of a multiemployer bargaining association was in retaliation for the exercise by two employees of their protected right to strike and, therefore, violative of Section 8(a)(3) of the Act. The Board, however, ruled that the union's strike of one association member was an attempt "to atomize the employer solidarity which is the fundamental aim of the multi-employer bargaining relationship," *id.* at 448, and concluded that the lockout was a permissible method of defending the integrity of the multiemployer bargaining relationship, despite its arguably adverse impact on the employees' protected right to strike. *See id.* at 448-449.

On review, the Second Circuit Court of Appeals concluded that the Board, in premising its decision on a desire to maintain the integrity of multiemployer bargaining, had usurped the power of Congress, since Congress had not expressed a clear opinion on multiemployer bargaining. *See Truck Drivers Local 449* v. *NLRB*, 231 F.2d 110, 117-118 (2d Cir. 1956). Accordingly, the Second Circuit rejected the legal foundation of the Board's decision and, thus, found no basis for the Board to engage in a balancing of interests. *See id.* at 118.

In *NLRB* v. *Truck Drivers Local 449*, *supra*, this Court disagreed with the Second Circuit's conclusion that the preservation of the integrity of multiemployer bargaining was not an

appropriate legal foundation for the Board's decision. Rather, the Court found ample support in the legislative history of the Taft-Hartley amendments for the policy of promoting stability in multiemployer bargaining. In this regard, this Court stated the following:

> At the time of the debates on the Taft-Hartley amendments, proposals were made to limit or outlaw multi-employer bargaining. These proposals failed of enactment. They were met with a storm of protest that their adoption would tend to weaken and not strengthen the process of collective bargaining and would conflict with the national labor policy of promoting industrial peace through effective collective bargaining.
>
> The debates over the proposals demonstrate that Congress refused to interfere with such bargaining because there was cogent evidence that in many industries the multi-employer bargaining basis was a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining. The inaction of Congress with respect to multi-employer bargaining cannot be said to indicate an intention to leave the resolution of this problem to future legislation.

353 U.S. at 95-96 (citations omitted).

Having concluded that the Board properly could balance the employees' right to strike against the preservation of the integrity of multiemployer bargaining, the Court then noted that Congress had left to the Board the primary responsibility for striking that balance and, therefore, adopted the balance struck by the Board. *See id.* at 96-97.

Thus, in reviewing the Board's decision in *NLRB* v. *Truck Drivers Local 449*, this Court examined the policy interests being balanced by the Board, and, having determined that those interests were valid, left to the Board the primary responsibility for striking the balance.

As noted *supra*, *NLRB* v. *Brown* also is illustrative of the functional application of the judicial review standards in cases involving multiemployer bargaining. In that case, the nonstruck members of a bargaining association were charged with violating Sections 8(a)(1) and (3) of the Act stemming from the lockout of their union employees and the hiring of temporary replacements. *See Brown Food Store*, 137 NLRB 73, 74 (1962). The Board found that the lockout did not serve to preserve the bargaining unit and concluded that the statutorily required antiunion motivation could be inferred from the actions taken by the nonstruck members and, thus, no evidence of a subjective intent to discriminate was necessary. *See id.* at 75. Accordingly, the Board, on balance, determined that the employees' right to be free from discriminatory conduct outweighed any incidental benefit which the lockout and hiring of temporary replacements might have had on furthering the stability of multiemployer bargaining. *See id.* at 75-77.

On review, this Court agreed with the appraisal of the Tenth Circuit Court of Appeals that the Board improperly concluded that the nonstruck association members' lockout of their union employees and the hiring of temporary replacements "carried its own indicia of unlawful intent." *NLRB* v. *Brown*, 380 U.S. at 282. As such, this Court ruled that the Board's decision had been based on "an erroneous legal foundation" and that, therefore, the balance struck by the Board could not be upheld. *Id.* at 292, *quoting NLRB* v. *Babcock & Wilcox*, *supra*.

In sum, in reviewing Board determinations involving issues arising in the context of multiemployer bargaining, this Court requires that the competing interests which are being balanced by the Board have a proper legal foundation; however, if it determines that such a foundation exists, this Court ensures that it is the Board and not the reviewing court of appeals which exercises the primary responsibility for striking the balance between those interests.

In the instant case, the Board, in effect, has balanced two different sets of "conflicting interests." First, the Board has balanced the preservation of the integrity of multiemployer bargaining against the "right" of an employer to unilaterally withdraw at impasse given that the Board has granted its imprimatur to the union's negotiation of interim agreements. This latter "right" had its origin in *NLRB* v. *Beck Engraving Co.*, 522 F.2d 475 (3d Cir. 1975), where the Third Circuit Court of Appeals perceived that the Board's policies had provided unions with two economic weapons, *i.e.*, the selective strike and individual negotiations, while affording employers only the right of lockout.[11] The Third Circuit, accordingly, believed that employers must be accorded a second economic weapon, *viz.*, the right to withdraw from bargaining, and that this second weapon must "accrue simultaneously based upon the occurrence of an event which neither [the union or the employers] can manipulate (e.g., impasse)." *Id.* at 483.

Second, the Board has balanced the preservation of the integrity of multiemployer bargaining against the "rights" of those employer members of an association who have not negotiated interim agreements with the union after impasse. As noted above, the facts of the instant case do not implicate the second balancing undertaken by the Board, and, as such, the balance struck by the Board in that instance need not be reviewed by this Court herein.[12]

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[11] "The union, under the Board's own policy, should not have been given two weapons for its economic arsenal (i.e., the selective strike and individual negotiations) while the employers are given only one (viz., the lockout)." 522 F.2d at 483.

[12] While not at issue in the instant case, the Board stated the results of its balancing of this second set of interests as follows:

> We have considered carefully the implications for multiemployer bargaining of interim agreements negotiated during impasse and conclude that such agreements may prevent significant unit fragmentation rather than cause it and do tend to facilitate the breaking of impasse. Interim agreements of the type deemed appropriate under our standards discussed *supra* are calculated to further, not destroy, unit integri-

As relates to the balancing of the first set of "conflicting interests," the Board first reaffirmed (*see* P. 41-42) its position set out in *Hi-Way Billboards, Inc.*, 206 NLRB 22 (1973), *supplementing* 191 NLRB 244, *enforcement denied*, 500 F.2d 181 (5th Cir. 1974), wherein it viewed an impasse as an expected part of negotiations which calls into play the use of economic weapons by both sides in an attempt to restart the flow of negotiations, and concluded that multiemployer bargaining, as a practical matter, would be destroyed if members of the unit were permitted to withdraw upon a bargaining impasse, since a member could then avoid his bargaining obligations by intentionally creating an impasse if an impending agreement was unfavorable.[13]

The Board, subsequently, addressed the alleged conflicting interest, which was perceived by the Third Circuit to be the imbalance of economic weapons, and concluded that, while the Third Circuit's perception of an imbalance of economic weapons itself was incorrect,[14] an alleged imbalance of econo-

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> ty inasmuch as they preserve a continuing mutual interest by all employer-members in a final associationwide contract. The provisions of the Act itself, rather than relative bargaining strengths, are the determinative factors in assessing the legality of particular forms of economic pressure (P. 51; footnote omitted).

[13] In this regard, the Board in *Hi-Way Billboards, Inc.*, stated the following:

> Were we to hold otherwise, we would be denying the practical reality of collective-bargaining negotiations, we would herald the demise of multi-employer bargaining, we would effectively negate the benefits of such bargaining to all parties and to the employees, and we would allow an employer to seize upon such an occurrence and use it as a ground for withdrawal merely because it was dissatisfied with the impending agreement, as Hi-Way did in the instant case. Consequently, we hold that it would not effectuate the purpose or policies of the Act to allow an employer member of such an association to withdraw solely on the ground that an impasse in negotiations has been reached.

206 NLRB at 23.

[14] *See* Argument II, *infra*.

mic weapons is not a legitimate interest to be balanced against the national policy in favor of multiemployer bargaining (*see* P. 49-50). As such, the Board had little trouble in striking the balance and finding that an impasse alone does not form an adequate basis for a party's nonconsensual withdrawal from multiemployer bargaining. Specifically, the Board concluded that "[c]onsidering the facts as described above in footnote 2,[15] including the achievement of the multiemployer bargaining objective to continue the method of driver-pay on wage basis, and the supportive action that the lockout afforded the Respondent during the strike against it, we see no reason to allow the Respondent to withdraw from the multiemployer unit in untimely fashion" (P. 51).

As detailed above, the Board, by restricting unilateral withdrawal at impasse, clearly is effectuating the continued viability of multiemployer bargaining and, accordingly, the balance it has struck has a sound legal foundation. Therefore,

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[15] Footnote 2 of the board's decision provides as follows:

> The Respondent is in the business of laundering and renting uniforms and linens. It has been a member of the Group which has negotiated with the Union for several years. Before the last contract expired in April 1975, negotiations were duly opened for a new agreement and the Respondent authorized the Group to bargain in its behalf. The Respondent participated in the negotiations. Impasse was reached in May 1975 over whether the employees would be paid on a commission basis or remain on wages. Thereafter, in June 1975, the Union called a selective strike against the Respondent, and most of the Group responded by locking out their employees. After some 5 months during which the situation remained static, with all efforts to break the impasse failing, the Respondent withdrew from the Group. The remaining Group members then terminated the lockout and negotiations resumed with the Respondent absent. In April 1976, when the Union dropped its demand for compensation by commission, an agreement was reached. The Union thereafter informed the Respondent that it had not consented to the withdrawal and thus considered the Respondent bound by the terms of the agreement reached with the Group. The Respondent denied that it was bound and refused to execute the agreement (P. 38-39).

the Board's determination is entitled to deference under the standard of review enunciated by this Court.

Moreover, under the decisions of this Court, the balance could not have been struck in any other manner, since the asserted imbalance of economic weapons has been rejected by this Court as an appropriate concern for the Board. *See, e.g., NLRB* v. *Insurance Agents' International Union*, 361 U.S. 477, 490 (1960) ("Our labor policy is not presently erected on a foundation of government control of the results of negotiations. . . . Nor does it contain a charter for the National Labor Relations Board to act at large in equalizing disparities of bargaining power between employer and union"); *NLRB* v. *Brown*, 380 U.S. at 283 ("We begin with the proposition that the Act does not constitute the Board as an 'arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands'"); *American Ship Building Co.* v. *NLRB*, 380 U.S. at 317 (the Act does not "give the Board a general authority to assess the relative economic power of the adversaries in the bargaining process and to deny weapons to one party or the other because of its assessment of that party's bargaining power").

Furthermore, the Third Circuit in *NLRB* v. *Beck Engraving Co.*, 522 F.2d at 483, itself recognized that "to some extent, basing the right of withdrawal upon the existence of an impasse rather than of individual negotiations contributes to instability within the context of multi-employer bargaining." *See also id.* at 484, where the Third Circuit stated that "we cannot avoid the conclusion that this additional incremental instability, however unfavorable to the policy aimed at stabilization of these units, is a necessary concomitant of ensuring that the parties have equal rights and that the existence and implementation of such rights do not grant unfair advantage to either party."

Accordingly, even under the broadest standard of review, the Board's determination that an impasse alone does not justify unilateral withdrawal would be entitled to affirmance,

since there is no dispute that a contra determination would have frustrated national labor policy by creating instability in multiemployer bargaining, and since there can be no reasonable claim that the balancing of economic weapons is a legitimate conflicting interest. As such, it is beyond peradventure that the First Circuit herein gave appropriate deference to the Board's policy judgment.

II. The Decision of the Third Circuit Court of Appeals is Neither Persuasive Nor Consonant with the Standard of Review Articulated by This Court.

In applying its "unusual circumstances" guideline, the Board initially met with substantial resistance from a number of reviewing courts in decisions involving the existence of a bargaining impasse and/or the negotiation of interim agreements. *See Fairmont Foods Co.* v. *NLRB*, 471 F.2d 1170 (8th Cir. 1972); *NLRB* v. *Hi-Way Billboards, Inc.*, 473 F.2d 649 (5th Cir. 1973); *NLRB* v. *Associated Shower Door Co.*, 512 F.2d 230 (9th Cir.), *cert. denied*, 423 U.S. 893 (1975); *NLRB* v. *Beck Engraving Co., supra*; *NLRB* v. *Independent Association of Steel Fabricators, Inc.*, 582 F.2d 135 (2d Cir. 1978), *cert. denied*, 439 U.S. 1130 (1979). At least in the case of *Fairmont Foods Co.* v. *NLRB*, the resistance can be traced to the failure of the Board prior to 1973 to articulate a consistent impasse doctrine in the multiemployer bargaining context.[16]

However, subsequent to the decision of the First Circuit herein, much of that early resistance has dissipated, as the Fifth Circuit has reconsidered its position taken in *NLRB* v. *Hi-Way Billboards, Inc.*, and has adopted the Board's present impasse doctrine, *see NLRB* v. *Marine Machine Works, Inc.*, 635 F.2d 522, 526 (5th Cir. 1981); and the Eight Circuit has indicated that *Fairmont Foods Co.* v. *NLRB*, "can no longer be considered controlling" in that circuit. *Tobey Fine Papers*

[16] Comment, 17 B.C. Indus. & Comm. L. Rev. 525, 528-530 (1976).

v. *NLRB*, F.2d , , 107 LRRM 2221, 2222 n.3 (8th Cir. 1981).

In addition, as noted by the First Circuit below, *NLRB* v. *Associated Shower Door Co.*[17] and *NLRB* v. *Independent Association of Steel Fabricators, Inc.* "hinged on the belief that the negotiation of individual agreements had unfairly tipped the balance of bargaining power, and not on any conviction that impasse alone justifies unilateral withdrawal." 630 F.2d at 33 (P. 33).

In this regard, in *Associated Shower Door*, negotiations between the union and the multiemployer association had reached an impasse, and the union had called a strike against all members of the association. Subsequently, individual agreements were reached between the union and several of the association members. Thereafter, several association members unilaterally withdrew from the multiemployer unit, although there was evidence that these members later rejoined the association. *Associated Shower Door Co., Inc.*, 205 NLRB 677, 679-80 (1973).

The majority of the Board concluded that the negotiating impasse coupled with the individual contracts did not justify the unilateral withdrawal of an association member and that in any case the actions of the respondent employers reestablished the agency relationships with the association. 512 F.2d at 677. In a concurring opinion Chairman Miller, while agreeing that the employers had rejoined the association, would have ruled that the making of individual agreements after an impasse is reached is sufficient justification for unilateral withdrawal. *Id.*

Enforcing the Board's order based on its finding that the employers had rejoined the association, the Ninth Circuit, noting the following, agreed with Chairman Miller's position:

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[17] The Ninth Circuit recently reaffirmed its holding in Associated Shower Door. *See H. & D, Inc.* v. *NLRB*, 633 F.2d 139 (9th Cir. 1980).

> The Board has held that a union which has commenced collective bargaining with a multi-employer unit may withdraw from the multi-employer unit with respect to one or more employers while continuing multi-employer bargaining with those employers remaining in the multiple unit. Pacific Coast Association of Pulp and Paper Manufacturers, 163 N.L.R.B. 892, 895-896 (1967). Since the Board has committed itself to preserving the equality of withdrawal rights in the multi-employer unit situation, *see* The Evening News Association, 154 N.L.R.B. 1494, 1495-1497 (1965), enforced sub. nom. Detroit Newspaper Publishers Association v. NLRB, 372 F.2d 569, 572 (6th Cir. 1967), it seems only fair that, when an impasse is reached *and* a union then engages in selective picketing *and enters into substantial individual agreements with employers who had been members of the multi-employer unit*, the withdrawal of *the remaining members of the unit*, if unequivocally communicated, should be permitted. *See* NLRB v. Hi-Way Billboards, Inc., 500 F.2d 181, 183-184 (5th Cir. 1974); Fairmont Foods Company v. NLRB, 471 F.2d 1170, 1172-1174, 1174 n.1 (8th Cir. 1972); Connell Typesetting Company, 212 N.L.R.B. No. 140 (1974).

512 F.2d at 232 (emphasis added).

Thus, in *Associated Shower Door*, it was the fact that the Board had allowed the union in that case to negotiate individually with the association members that persuaded the court to allow the respondent-employers to withdraw. This conclusion is supported by the fact that the Ninth Circuit cited the Board's decision in *Connell Typesetting Co.*, 212 NLRB 918 (1974), as support for its conclusion. *Connell Typesetting* was decided a year after the Board's *Associated Shower Door* decision and involved employer withdrawal from a multiemployer unit after selective strikes had been engaged in, and

individual interim agreements entered into. The Board in *Connell Typesetting* ruled that the union's extensive negotiation of interim agreements with employer members of the association justified unilateral employer withdrawal. *Id.* at 921.

Similarly, the union in *Steel Fabricators* had called a strike against all members of the multiemployer bargaining association after negotiations broke down. Thereafter, the union negotiated separately with four employer members of the association and, ultimately, nineteen members of the association unilaterally withdrew from multiemployer bargaining.

In reviewing that portion of the Board's decision which dealt with employer withdrawal rights at impasse, the Second Circuit indicated that determining such withdrawal rights involved the balancing of legitimate conflicting interests and acknowledged that the striking of that balance is entrusted primarily to the NLRB. However, the court, citing the individual negotiations, rejected the balance struck by the Board. In this regard, the court stated the following:

> That Local 455 agreed to negotiate separately with four former members of the Association during the August to January interval (Dextra, Atwater, North Shore, and Charla) is also indicative of the inability of the union and the Association to engage in fruitful discussion. Moreover, although the union did not selectively picket or otherwise pressure any particular member, its willingness to negotiate separately with several members had something of a whipsaw effect on the remaining members who watched certain of their withdrawing competitors resume business while they themselves were still in the throes of an economic strike. *Cf. N.L.R.B. v. Associated Shower Door, supra*, 512 F.2d at 232; *N.L.R.B. v. Beck Engraving, supra*, 511 F.2d at 482-83; *N.L.R.B. v. Hi-Way Billboards, supra*, 500 F.2d at 183.

582 F.2d at 147.

Accordingly, neither the decision of the Ninth Circuit nor that of the Second Circuit is inconsistent with that of the First Circuit herein, since same was premised on the existence of *both* a bargaining impasse *and* the negotiation of interim agreements. However, *NLRB* v. *Beck Engraving Co.* "is squarely on point, 630 F.2d at 33 (P. 33); but, as detailed below, that decision is neither persuasive nor consonant with the appropriate standard of review.

In *Beck Engraving*, the respondent-employer had withdrawn from the multiemployer bargaining association and later argued that (1) the resignation of its employees from the union, (2) the consent by the union to the withdrawal of another member of the unit, and (3) the instigation of the selective strike by the union against the respondent, represented "unusual circumstances" and thus justified its untimely withdrawal. *Beck Engraving Co.*, 213 NLRB 53, 54-55 (1974). The Board, however, rejected these facts as insufficient. The respondent subsequently moved to have the Board reconsider its decision, arguing that the parties had reached a bargaining impasse and that such an impasse constituted an "unusual circumstance." 522 F.2d at 478-479 & n.8. The Board denied this motion and sought enforcement of its order.

The Third Circuit denied enforcement of the Board's order. The court perceived that the Board, in the context of multiemployer bargaining, had permitted unions to engage in selective strikes and enter into interim agreements while only permitting employers to lock out their employees. As such, the Third Circuit believed that there existed an imbalance of economic weapons which justified "according the employer an equivalent right," *i.e.*, unilateral withdrawal at impasse. *Id.* at 483. Moreover, the court concluded that "[t]he employer's right to withdraw during a bargaining impasse cannot be made contingent upon the union's prior exercise of its right to negotiate individual interim agreements," rather, "[t]he rights of the parties should accrue simultaneously based upon the occurrence of an event which neither can manipulate (e.g., im-

passe)." *Id.* However, as pointed out by the First Circuit below, *see* 630 F.2d at 31-32 and 34-35 (P. 29-30, 34-36), and by certain commentators,[18] the reasoning of the Third Circuit is suspect.

First, this Court in *NLRB* v. *Insurance Agents' International Union*, 361 U.S. at 488, restricted "any governmental power" from acting as an "arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands." *Id.* at 497. Thus, this Court requires that the legitimacy of a bargaining tactic be determined isolated from any notion of relative bargaining strength and based on the pertinent statutory standard. The Third Circuit violated said requirement when it granted withdrawal rights based not on a thoughtful analysis of the Act, but, rather, on an assessment of the parties' relative bargaining position. This form of balancing improperly affects the substantive terms of the ultimate collective bargaining agreement — an effect denounced in *NLRB* v. *Insurance Agents' International Union*. *See id.* at 497-498.

Second, even if the Third Circuit's balancing of economic weapons was permissible conceptually, it was extremely imprecise. In this regard, in addition to the three "economic weapons" noted by the court, this Court permits, *inter alia*, (1) union harassing tactics while on the job, *see id.* at 490-492, (2) the struck members of an association to lock out their union employees and hire temporary replacements, *see NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. at 345, (3) the non-struck members of an association to lock out their union employees and hire temporary replacements, *see NLRB* v. *Brown*, 380 U.S. at 283, (4) all association members to use the lockout offensively, *see American Ship Building Co.* v. *NLRB*, 380 U.S. at 318, (5) all association members to make unilateral

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[18] *See* Murphy, *Impasse And The Duty To Bargain In Good Faith*, 39 U. Pitt. L. Rev. 1, 50-60 (1977); Comment, 17 B.C. Indus. & Com. L. Rev. 525, 533-540.

changes in working conditions consonant with the offers the union has rejected, *see NLRB* v. *Katz*, 369 U.S. 736, 745 and n.12 (1962), and (6) all association members to blunt the effectiveness of an anticipated strike by stockpiling, readjusting schedules and transferring work. *See NLRB* v. *Brown*, 380 U.S. at 283. As such, the basic premise of the Third Circuit's decision, *i.e.*, an imbalance of economic weapons, is both conceptually and factually defective.

Third, the court's contention that a bargaining impasse cannot be manipulated ignores the present state of the law which permits "hard bargaining" and "provides a party with a means of withdrawing whenever the impending agreement proves objectionable." 630 F.2d at 34 (P. 35). Moreover, the Third Circuit's rationale that the "rights of the parties should accrue simultaneously," 522 F.2d at 483, is inconsistent with court-supported Board findings of "unusual circumstances" in situations other than those involving impasse.

Thus, for example, in *Spun-Jee Corp.*, 171 NLRB 557 (1968), the Board, after examining the *individual facts* of the case, concluded that the economic distress of the respondent-employer justified its unilateral withdrawal. *Id.* at 557-558. In that case there was no "simultaneous" occurrence of withdrawal rights of the employer and the union. In fact, the employer's withdrawal had no effect on the bargaining responsibilities of the union vis-a-vis the remaining association members.

Similarly, in *Connell Typesetting Co.*, *supra*, the Board found that the union had fractured the multiemployer unit by entering into interim agreements with one-half of the employers in the multiemployer unit. The Board then concluded that the union's action constituted "unusual circumstances" justifying the respondent-employers' withdrawal. 212 NLRB at 921. Clearly, in *Connell Typesetting* the employers' withdrawal rights were contingent upon the union's actions in entering into interim agreements. Thus, in that case, an employer's withdrawal rights were not based upon the occurrence of an event which neither could manipulate.

Accordingly, the analysis of the Third Circuit in *Beck* clearly is unpersuasive. Furthermore, that analysis ignores the standard of review articulated by this Court.

In this regard, the Third Circuit in *Beck* readily acknowledges that its decision "contributes to instability within the context of multi-employer bargaining" and, as such, is "unfavorable to the policy aimed at stabilization of [multiemployer] units." 522 F.2d at 483-484. However, the Third Circuit believes that the balance of "conflicting interests" must be struck in favor of remedying the perceived imbalance of economic weapons. Thus, even if the defects in the Third Circuit's analysis are overlooked, it is evident that the court has made itself primarily responsible for striking the balance between the conflicting interests "to effectuate national labor policy," *NLRB* v. *Truck Drivers Local 449*, 353 U.S. at 96, and thereby has usurped the function of the Board, as delegated by Congress.

In sum, the decision of the First Circuit herein is in conflict with that of the Third Circuit in *Beck*. However, while the decision below is analytically sound, that of the Third Circuit is neither persuasive nor consonant with the standard of review enunciated by this Court.

Conclusion.

Multiemployer bargaining serves a vital national interest. Its preservation, however, is contingent on restricting severely a party's right to unilaterally withdraw from such bargaining once negotiations have commenced. An impasse is a common and temporary stage in normal collective bargaining and may be manipulated by a party. As such, linking a party's nonconsensual withdrawal rights to the existence of a bargaining impasse would make the maturing of such rights commonplace and would sanction unfettered withdrawals. Such a result would be antithetical to multiemployer bargaining and, in turn, to the national interest.

In the instant case, Bonanno participated in multiemployer bargaining as long as it served its own interest. In particular, Bonanno readily accepted the protective umbrella of the Association-wide lockout and only withdrew from the Association after it had hired permanent replacements for its striking employees, and thereby rendered unnecessary the protections available through the Association. Thus, the instant case represents a classic example of how multiemployer bargaining will be weakened or destroyed should this Court overrule the balance struck by the Board and find that a bargaining impasse, standing alone, justifies a party's unilateral withdrawal from multiemployer bargaining.

Accordingly, Respondent, Teamsters Local Union No. 25, respectfully urges this Court to affirm the decision of the First Circuit below.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1980

CHARLES D. BONANNO LINEN SERVICE, INC., PETITIONER
v.
NATIONAL LABOR RELATIONS BOARD and TEAMSTERS LOCAL UNION NO 25, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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QUESTION PRESENTED

Whether the National Labor Relations Board has reasonably determined that it would not effectuate the policies of the National Labor Relations Act to permit employers unilaterally to withdraw from multiemployer bargaining units solely because of an impasse in negotiations with the bargaining representative of the unit employees.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-931

CHARLES D. BONANNO LINEN SERVICE, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD and TEAMSTERS LOCAL UNION NO 25, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 18-37) is reported at 630 F.2d 25. The supplemental decision and order of the National Labor Relations Board (Pet. App. 38-52) is reported at 243 N.L.R.B. No. 140. The Board's original decision and order (Pet. App. 53-71) is reported at 229 N.L.R.B. 629.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 1980. The petition for a writ of certiorari was filed on December 10, 1980, and granted on March 9, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth in the appendix, *infra*, pages 1a-3a.

STATEMENT

1. Petitioner, Charles D. Bonanno Linen Service, Inc., is a Massachusetts corporation engaged in the laundering, rental, and distribution of linen products. The truck drivers and helpers employed by petitioner, as well as by other linen supply companies in the area, are represented by Teamsters Local No. 25 ("the Union"). For the purposes of negotiating with the Union concerning the terms and conditions of employment of these workers, petitioner for several years has joined with nine of its competitors in a multiemployer unit called the New England Linen Supply Association ("the Association"). Bonanno was a signatory to the contract negotiated between the Association and the Union to cover the period from September 21, 1972 to April 18, 1975. (Pet. App. 54-55; A. 92-93.) On February 19, 1975, Bonanno authorized the Association's negotiating committee to represent it in the anticipated negotiations for a new contract, and Bonanno's president became a member of that committee. (Pet. App. 56; A. 23, 52, 106, 108.)

The Union and the Association held ten bargaining sessions in March and April of 1975. On April 30, a proposed contract was agreed upon by the negotiators, but was rejected by the Union members four days later. By May 15, the parties had reached an impasse over the issue of compensation: following the membership's rejection of the contract providing for payment of the drivers on an hourly basis, the Union demanded that the drivers be paid on a commission basis, while the Association insisted that they continue to receive payment at an hourly rate. (Pet. App. 56; A. 93-94.) When several subsequent meetings proved unsuccessful in breaking

the impasse, the Union, on June 23, initiated a selective strike against Bonanno. In response, the remaining Association members locked out their drivers. The stalemate continued throughout the summer, with the negotiators unable to agree upon a method of payment in meetings held in July, August, and September. (Pet. App. 56-57; A. 94.)

The Association's agreed strategy during the negotiations was both to resist the commission method of payment and to remain moderate in its hourly wage rate proposals. After the dispute continued into the fall, some members began to talk of changing this strategy by offering the Union a large wage increase, and two members met secretly with the Union.[1] The majority of the Association, including Bonanno, however, remained strongly opposed to any shift in strategy and were concerned that the separate meetings created a credibility problem for the Association. (A. 74-80.) Bonanno demanded and received from the Association members a pledge that there would be no more separate meetings with the Union. (A. 77-78).

On November 21, after it had hired permanent replacements for all of its striking drivers, Bonanno notified the Association by letter that it was "withdrawing from the association with specific respect to negotiations at this time because of an ongoing impasse with Teamsters Local 25" (Pet. App. 58; A. 94-95, 106).[2] Shortly thereafter, the Association terminated the lockout and informed the Union that it wished to continue negotia-

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[1] No separate agreements were made, and there is no evidence that these contacts even reached the level of attempted negotiation (Pet. App. 51, 57-58).

[2] On the same day, Bonanno mailed a copy of its revocation letter to the Union and read it by telephone to a Union representative. The Union representative made no comment other than to state that he would await the letter and probably consult the Union's attorney. (Pet. App. 58, 61; A. 28-29, 95, 106.)

tions on a multiemployer basis (Pet. App. 59; A. 95, 108-109).

Following Bonanno's attempted withdrawal, several negotiating sessions were conducted between December 1975 and April 1976 (Pet. App. 59-60; A. 95). On April 5, 1976, the Association submitted a substantially revised wage offer, but no agreement was reached (A. 53). On April 9, the Union filed unfair labor practice charges alleging that Bonanno unlawfully withdrew from the multiemployer unit on November 21 (Pet. App. 54; A. ii). On April 13, the Union abandoned its demand for payment by commission and accepted the Association's offer of a revised hourly wage rate. With this development, the parties quickly reached agreement on a new contract, dated April 23, 1976, and given retroactive effect to April 18, 1975. (Pet. App. 60; A. 95, 111-116.)

By letter dated April 29, 1976, the Union informed Bonanno that the Union had never consented to its withdrawal and therefore considered it to be bound by the settlement just reached. Bonanno denied it was bound by the contract in a reply letter dated May 3, 1976. (Pet. App. 60; A. 95-96, 117-118.)

2. The Board, adhering to its view that an impasse in bargaining negotiations is not an "unusual circumstance" that would permit unilateral withdrawal from a multiemployer bargaining unit after negotiations had commenced, concluded that Bonanno's attempt to withdraw from the multiemployer unit was untimely and thus ineffective. It therefore held that Bonanno violated Section 8(a)(5) and (1) of the National Labor Relations Act (29 U.S.C. 158(a)(5) and (1)) by refusing to honor the collective bargaining agreement negotiated by the Association with the Union. (Pet. App. 38-51.) The Board ordered Bonanno, *inter alia*, to sign and implement the contract between the Association and the Union, and to give it retroactive effect to its effective date, making Bonanno's employees whole for any loss of pay or other employment benefits that they had suffered since that date (Pet. App. 52, 66).

3. The court of appeals held that "the Board has struck a reasonable balance in concluding that impasse alone does not justify unilateral withdrawal" from a multiemployer bargaining unit, for the contrary rule "unnecessarily increases the opportunities for the dissolution of such bargaining units and thereby undermines an effective tool of labor relations" (Pet. App. 36). The court therefore enforced the Board's order (Pet. App. 37).

SUMMARY OF ARGUMENT

I

In *NLRB* v. *Truck Drivers Local Union No. 449 (Buffalo Linen)*, 353 U.S. 87 (1957), this Court held that Congress, in enacting the 1947 Taft-Hartley amendments to the Act, recognized that multiemployer bargaining "was a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining," and " 'intended to leave to the Board's specialized judgment the inevitable questions concerning multi-employer bargaining bound to arise in the future' " (*id.* at 95-96). In *Retail Associates, Inc.*, 120 N.L.R.B. 384 (1958), the Board announced new rules governing withdrawal from a multiemployer bargaining unit. Under these rules, an employer or a union is free to withdraw from the multiemployer unit for any reason before the date on which negotiations actually commence, provided adequate notice is given. Once negotiations for a contract have begun, however, a party may withdraw only if "mutual consent" is given or if "unusual circumstances" exist.

By allowing unlimited withdrawals from the unit prior to the start of negotiations, the *Retail Associates* rules accommodate the legitimate interest of both individual employers and their represented employees in retaining (or reclaiming) direct control over their own labor relations. At the same time, they avoid the impairment of the public and private objectives of multiemployer bargaining that would occur if the parties

were free to withdraw from the unit at will once bargaining has begun.

A reasonable stability in the employer complement is essential since "'[t]he parties cannot bargain meaningfully about wages or hours or conditions of employment unless they know the unit of bargaining.'" *Hess Oil & Chemical Corp.* v. *NLRB*, 415 F.2d 440, 444 (5th Cir. 1969), cert. denied, 397 U.S. 916 (1970). Moreover, "[a] shift in membership after negotiations have begun has lively possibilities for disrupting the bargaining process." *NLRB* v. *Sheridan Creations, Inc.*, 357 F.2d 245, 248 (2d Cir. 1966), cert. denied, 385 U.S. 1005 (1967). Finally, permitting withdrawal at will during bargaining would deprive employers, unions, and employees of any fair and predictable means for determining the continued legitimacy of the employees' bargaining representative.

II

The Board has reasonably concluded that a bargaining impasse is not an "unusual circumstance" that justifies an untimely withdrawal from a multiemployer bargaining unit.

An impasse in negotiations "cannot be said to be an unexpected, unforeseen, or unusual event in the process of negotiations." *Hi-Way Billboards, Inc.*, 206 N.L.R.B. 22, 23 (1973). It is "only a temporary 'deadlock' or 'hiatus' in negotiations which in almost all cases is eventually broken either through a change of mind or the application of economic force" (Pet. App. 41).

Furthermore, the problem of deciding whether the parties have reached impasse "is often difficult for the bargainers and is necessarily so for the Board." *Dallas General Drivers, Local Union No. 745* v. *NLRB*, 355 F.2d 842, 844 (D.C. Cir. 1966). Moreover, if withdrawal were permitted at impasse, the parties would bargain under the threat of withdrawals by those who were not completely satisfied with the results of the negotiations. This would permit the scope of the unit to be used as

a "bargaining lever"—a result that is contrary to sound principles consistently approved in the multiemployer context.

Finally, it is precisely at and during impasse—when bargaining is temporarily replaced by economic warfare—that the parties' need for a stable, predictable bargaining unit is most acute. The partial or complete destruction of the multiemployer unit by unlimited unilateral withdrawals at or during impasse would tend to unsettle any tentative agreements or mutually dependent compromises that may have been reached in prior bargaining, and also would be unfair to the other parties who had applied or withstood economic pressure in support of the unit-wide bargaining demands.

III

The possibility that a union might enter into interim agreements with individual employers during a strike does not warrant a rule permitting employers unilaterally to withdraw from a multiemployer unit at impasse.

Initially, even if some right of withdrawal were necessary to counter-balance the union's ability to negotiate interim agreements, there would be little reason to link it to the existence of an impasse. Because employers may lock out employees and employees may strike prior to impasse, interim settlement of these economic conflicts are often reached prior to impasse.

In any event, interim agreements of the kind the Board has approved are not the equivalent of unilateral withdrawal from a multiemployer unit. The Board has approved interim agreements only in situations where employees work during the strike either under the terms of the expired contract, or under the terms that the union had previously offered to the employers' association and the association had rejected. In either case, the parties mutually recognize that these terms are temporary, pending the outcome of the group bargaining, and that any contract reached in the multiemployer unit

will ultimately govern all employer-employee relationships in that unit. Such agreements are in sharp contrast to final separate agreements with members of the multiemployer unit.

To be sure, interim agreements, like the selective strike—of which they are an integral part—may create a whipsaw pressure on the remaining employers to agree to the union's demands within the unit. However, "the uneven application of economic pressure *per se* is not inconsistent with multiemployer bargaining" (Pet. App. 33). The whipsaw pressure on the remaining members of an employer association from interim agreements is analytically no different from the pressure that results when some members refuse to join in a lockout in response to a selective strike.

ARGUMENT

THE BOARD HAS REASONABLY DETERMINED THAT IT WOULD NOT EFFECTUATE THE POLICIES OF THE ACT TO PERMIT AN EMPLOYER UNILATERALLY TO WITHDRAW FROM A MULTIEMPLOYER BARGAINING UNIT SOLELY BECAUSE OF AN IMPASSE IN NEGOTIATIONS WITH THE BARGAINING REPRESENTATIVE OF THE UNIT EMPLOYEES

Multiemployer bargaining is a consensual arrangement in which a group of employers agrees unequivocally to be bound by group action in collective bargaining negotiations, and a union (or group of unions) agrees to bargain with the employers' designated representative for a bargaining unit composed of employees of all the employers.[3] The practice of multiemployer bargaining was approved by the Board early in its administration

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[3] *NLRB* v. *Hart*, 453 F.2d 215, 217-218 (9th Cir. 1971), cert. denied, 409 U.S. 844 (1972); *Komatz Construction, Inc.* v. *NLRB*, 458 F.2d 317, 321 (8th Cir. 1972); *McAx Sign Co.* v. *NLRB*, 576 F.2d 62, 66 (5th Cir. 1978), cert. denied, 439 U.S. 1116 (1979).

of the National Labor Relations Act,[4] and a large number of employers and unions currently elect to use this procedure[5] as the means of satisfying their mutual obligations to bargain in good faith.[6]

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[4] *Shipowners' Ass'n of the Pacific Coast*, 7 N.L.R.B. 1002, 1024-1025 (1938), appeal dismissed on other grounds *sub nom. AFL* v. *NLRB*, 103 F.2d 933 (D.C. Cir. 1939), aff'd, 308 U.S. 401 (1940); *Waterfront Employers Ass'n of the Pacific Coast*, 71 N.L.R.B. 80, 109-111 (1946).

[5] A recent survey of major collective bargaining agreements—those covering 1,000 or more employees—found that of 1,536 major agreements, 648 (42%) were multiemployer agreements and that 3,238,400 employees were covered by these agreements. U.S. Bureau of Labor Statistics, Dept. of Labor, Bull. No. 2065, *Characteristics of Major Collective Bargaining Agreements—January 1, 1978*, at 12, table 1.8 (1980).

[6] Section 8(d) of the Act, 29 U.S.C. 158(d) states, in relevant part:

> [T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, * * * and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession * * *.

Section 8(a)(5) of the Act, 29 U.S.C. 158(a)(5), declares it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." Section 8(b)(3), 29 U.S.C. 158(b)(3), likewise declares it an unfair labor practice for a labor organization "to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a)." Section 9(a), 29 U.S.C. 159(a), in turn, specifies that "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining * * *." Finally, under Section 2(2), 29 U.S.C. 152(2), the term "employer" includes "any person acting as an agent of an employer, directly or indirectly," and the term

Prior to the passage of the Taft-Hartley amendments in 1947 (61 Stat. 136), Congress carefully reviewed the practice of multiemployer bargaining. It declined to enact legislation that would have limited or outlawed this practice, because it concluded that in many industries the practice is "a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining" (*NLRB* v. *Truck Drivers Local Union No. 449* (*Buffalo Linen*), 353 U.S. 87, 95-96 (1957)).[7] Congress evidently intended " 'that the Board should continue its established administrative

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"person" is defined in Section 2(1), 29 U.S.C. 152(1), to include "associations."

[7] By joining multiemployer bargaining units, smaller employers are able to bargain on an equal basis with a large union, and to avoid "the competitive disadvantages resulting from nonuniform contractual terms." *Buffalo Linen*, *supra*, 353 U.S. at 96. In such bargaining, employers can make concessions without fear that other employers will refuse to make similar concessions and thus achieve a competitive advantage; likewise, a union can make concessions without fear that the employees will be dissatisfied with not receiving the same benefits which the union might win from other employers. Thus, multiemployer bargaining encourages both employers and unions to offer reasonable concessions and to reach agreement without industrial strife. See R. Randall, *Labor Relations in the Pulp and Paper Industry of the Pacific Northwest* 102-103 (1942); S. Rep. No. 105 (Pt. 2), 80th Cong., 1st Sess. 7 (1947); H.R. Rep. No. 245, 80th Cong., 1st Sess. 86-88 (1947); 93 Cong. Rec. 4674 (Sen. Knowland), 4574-4575 (Sen. Kilgore), 1834-1844 (Sen. Morse) (1947); General Subcomm. on Labor, of the House Comm. on Education and Labor, 88th Cong., 2d Sess. *Multi-Employer Association Bargaining and its Impact on the Collective Bargaining Process* 12-13 (1964). Moreover, multiemployer bargaining facilitates the development of industry-wide programs benefiting employees, such as pension funds, health insurance plans, apprenticeship or retraining course, and hiring halls. Absent multiemployer bargaining, many employers would be unable to offer such benefits, either because the employer employs too few employees or because employees are too transient to allow efficient operation of such programs. See Multiemployer Pension Plan

practice of certifying multi-employer units, and intended to leave to the Board's specialized judgment the inevitable questions concerning multi-employer bargaining bound to arise in the future.' " 353 at 96, quoting *Truck Drivers Local Union No. 449* v. *NLRB*, 231 F.2d 110, 121 (2d Cir. 1956) (dissenting opinion).[8]

One of the recurring questions in multiemployer bargaining concerns the respective rights and obligations of the parties when some but not all of the parties wish to end their consensual relationship. Following this Court's recognition in *Buffalo Linen* that it is a policy of the Act to preserve the integrity of multiemployer bargaining units, the Board, in *Retail Associates, Inc.*, 120 N.L.R.B. 384 (1958), sought to provide guidance to the participants in multiemployer bargaining and announced new ground rules for withdrawal that it intended to apply in future cases. Under these rules, an employer or union is free to withdraw from the multiemployer unit for any reason before the date set for renegotiation of an existing contract or the date on which negotiations actually commence, provided adequate notice is given. Once negotiations for a new contract have begun, however, a party may withdraw only if "mutual consent"

Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208, to be codified at 29 U.S.C. 1001a; H.R. Rep. No. 96-869 (Pt. I), 96th Cong., 2d Sess. 51-54, 65 (1980); *Multi-Employer Association Bargaining and its Impact on the Collective Bargaining Process*, *supra*, at 15; U.S. Dep't of Labor, *Multi-Employer Pension Plans Under Collective Bargaining* 1 (1960).

[8] In *Buffalo Linen*, the Court upheld the Board's conclusion that "a temporary lockout may lawfully be used as a defense to a union strike tactic which threatens the destruction of the employers' interest in bargaining on a group basis" (353 U.S. at 93). See also *NLRB* v. *Brown*, 380 U.S. 278 (1965) (employers who locked out to defend the multiemployer unit against a whipsaw strike may lawfully resume operations with temporary replacements when the struck employer has also done so).

is given or if "unusual circumstances" exist. *Id.* at 395.[9]

Although the *Retail Associates* rules are now well accepted,[10] the courts of appeals have divided over the

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[9] Prior to the development of its *Retail Associates* rules, the Board permitted employers to abandon a multiemployer unit in the midst of bargaining (*e.g., Bearing & Rim Supply Co.*, 107 N.L.R.B. 101, 102-103 (1953); *Stamford Wall Paper*, 92 N.L.R.B. 1173 (1951)). And in *Morand Bros. Beverage Co.*, 91 N.L.R.B. 409, 413, 416-418 (1950), enforced in part on other grounds, 190 F.2d 576, 581-582 (7th Cir. 1951), the Board, in an effort to reduce "the existing disparity between the treatment accorded employers and unions," held that a union could withdraw from a multiemployer unit at impasse (*id.* at 418). On review of *Morand Bros. Beverage*, the Seventh Circuit specifically declined to "indorse the Board's reasoning to the effect that, once negotiations have been stalemated, a union may utterly disregard the employer unit with which it has theretofore bargained and proceed to fashion a new unit for bargaining purposes * * *." 190 F.2d at 582. Thereafter, through other cases raising the issue of the legitimacy of the lockout in multiemployer bargaining (see *Buffalo Linen, supra*, 353 U.S. at 89 n.5), the Board came to recognize the need for greater stability in multiemployer bargaining. It concluded that the attempted abandonment of a multiemployer unit by an employer and his employees because of dissatisfaction with the results of group bargaining was inconsistent with the commitment to be bound by the results of such bargaining (*McAnary & Welter, Inc.*, 115 N.L.R.B. 1029, 1031-1032 (1956)), and, in *Retail Associates*, it refused to approve a union's mid-negotiation withdrawal from a multiemployer unit in an effort to defeat the Association's petition for an election in that unit, reasoning that "the stability requirement of the Act dictates that reasonable controls limit the parties as to the time and manner that withdrawal will be permitted from an established multiemployer bargaining unit" (120 N.L.R.B. at 393).

The Board's increasing emphasis on the stability of multiemployer units was paralleled by its development of a new policy favoring stability in industrial units and restricting the right of craft employees to withdraw from such units. See *Mallinckrodt Chemical Works*, 162 N.L.R.B. 387, 391-398 (1966), overruling *American Potash & Chemical Corp.*, 107 N.L.R.B. 1418, 1420-1424 (1954).

[10] See, *e.g., Carvel Co.* v. *NLRB*, 560 F.2d 1030 (1st Cir. 1977), cert. denied, 434 U.S. 1065 (1978); *NLRB* v. *John J. Corbett Press*,

question whether a bargaining impasse is an "unusual circumstance" that justifies an employer or a union in unilaterally withdrawing from a multiemployer bargaining unit.[11] In light of the considerations that underlie

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Inc., 401 F.2d 673 (2d Cir. 1968); *NLRB* v. *Dover Tavern Owners Ass'n*, 412 F.2d 725 (3d Cir. 1969); *NLRB* v. *Marine Machine Works, Inc.*, 635 F.2d 522 (5th Cir. 1981); *NLRB* v. *Central Plumbing Co.*, 492 F.2d 1252 (6th Cir. 1974); *NLRB* v. *Custom Wood Specialties, Inc.*, 622 F.2d 381 (8th Cir. 1980); *NLRB* v. *Brotherhood of Teamsters, Local No. 70*, 470 F.2d 509 (9th Cir. 1972), cert. denied, 414 U.S. 821 (1973); *NLRB* v. *Johnson Sheet Metal, Inc.*, 442 F.2d 1056 (10th Cir. 1971).

[11] Since the Board first decided the issue in *Hi-Way Billboards, Inc.*, 206 N.L.R.B. 22 (1973), enforcement denied, 500 F.2d 181 (5th Cir. 1974), four circuit courts of appeals have rejected the Board's position that a bargaining impasse is not an unusual circumstance under the *Retail Associates* rules: *NLRB* v. *Hi-Way Billboards, Inc.*, 500 F.2d 181 (5th Cir. 1974); *NLRB* v. *Associated Shower Door Co.*, 512 F.2d 230 (9th Cir.), cert. denied, 423 U.S. 893 (1975) (dictum); *NLRB* v. *Beck Engraving Co.*, 522 F.2d 475 (3d Cir. 1975); *NLRB* v. *Independent Ass'n of Steel Fabricators*, 582 F.2d 135 (2d Cir. 1978), cert. denied, 439 U.S. 1130 (1979).

Following the Board's reconsideration and clarification of its position in the present case (Pet. App. 38-51), however, its position has been approved not only by the First Circuit (Pet. App. 18-37), but also by the Fifth Circuit (*NLRB* v. *Marine Machine Works, Inc.*, *supra*, 635 F.2d at 524-526), which has now reconsidered its decision in *Hi-Way Billboards*, *supra*. The Ninth Circuit, by contrast, adheres to *Associated Shower Door*, *supra*, and to the Third Circuit's decision in *Beck Engraving*, *supra*. See *H & D, Inc.* v. *NLRB*, 105 L.R.R.M. 3070 (9th Cir. 1980), petition for cert. pending, No. 80-1498 (filed Mar. 4, 1981).

Contrary to petitioner, *Fairmont Foods Co.* v. *NLRB*, 471 F.2d 1170, 1172 (8th Cir. 1972), was decided before *Hi-Way Billboards, Inc.*, *supra*, and, accordingly, did not pass upon "the Board's rejection of impasse as an 'unusual circumstance'" (Pet. Br. 16). The language quoted by petitioner (Br. 16-17) is "dicta * * * [that] relied primarily on what this court perceived to be the Board's policy and in view of the change of this policy, *Fairmont* can no longer be considered controlling in this circuit." *Tobey Fine Papers of Kansas City* v. *NLRB*, 107 L.R.R.M. 2221, 2222 n.3 (8th Cir. 1981).

the *Retail Associates* rules, we submit that the Board reasonably has concluded that a bargaining impasse is not such a circumstance.

A. The Board's *Retail Associates* Rules Reflect a Reasoned Balance of the Public and Private Interests in Multiemployer Bargaining

The Board's *Retail Associates* rules allow unlimited withdrawals from multiemployer bargaining units prior to the commencement of negotiations, but prohibit withdrawals from the unit once bargaining has begun in the absence of mutual consent or unusual circumstances. They reflect a reasoned exercise of the Board's authority under Section 9 of the Act to define appropriate bargaining units, and its authority under Section 8 of the Act to enforce the duty to bargain, because they help to effectuate the statutory policy of promoting industrial peace through collective bargaining.[12] Those rules fairly promote the public and private interests in multiemployer bargaining and are consistent with the objectives of Congress in sanctioning the continued practice of multiemployer bargaining.

Thus, by allowing unlimited withdrawals from the unit prior to the start of negotiations, the *Retail Asso-*

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[12] Section 9(b) of the Act, 29 U.S.C. 159(b), directs the Board to decide "in each case * * * the unit appropriate for the purposes of collective bargaining" and obliges the Board to consider, among other factors, "the anticipated effectiveness of the unit in maintaining industrial peace through collective bargaining" and whether the unit implements the Act's "policy of efficient collective bargaining." *Pittsburgh Plate Glass Co.* v. *NLRB*, 313 U.S. 146, 156, 165 (1941). Sections 8(a)(5) and 8(b)(3) authorize the Board "to order the cessation of behavior which is in effect a refusal to negotiate, or which directly obstructs or inhibits the actual process of discussion, or which reflects a cast of mind against reaching agreement." *NLRB* v. *Katz*, 369 U.S. 736, 747 (1962). The Board is likewise authorized, pursuant to Section 8(d) and Section 10(c), 29 U.S.C. 158(d) and 160(c), to order employers or unions to sign and honor collective agreements that have been negotiated on their behalf. *NLRB* v. *Strong*, 393 U.S. 357 (1969).

ciates rules accommodate the legitimate interest of both individual employers and their represented employees in retaining (or reclaiming) direct control over their own labor relations. History has demonstrated that, even in longstanding multiemployer relationships, parties may come and go in response to changed industrial circumstances,[13] and that the desire for individual control over vital issues in the employment relationship may be strongly felt.[14] As a practical matter, the failure to provide an outlet for the dissatisfactions that may arise in a multiemployer bargaining relationship would very likely retard the practice of bargaining on this basis, since employers and unions alike "would understandably be reluctant to initiate multiemployer bargaining if the decision to do so were virtually irrevocable." *The Evening News Association*, 154 N.L.R.B. 1494, 1499 (1965), enforced *sub nom. Detroit Newspaper Publishers Ass'n* v. *NLRB*, 372 F.2d 569 (6th Cir. 1967).

Moreover, providing such an outlet gives due recognition to the fact that, in approving the practice of multiemployer bargaining, Congress indicated its approval of the Board's view that multiemployer bargaining rests on a foundation of mutual consent.[15] Further, Congress

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[13] See, *e.g.*, *Pacific Coast Ass'n of Pulp & Paper Mfrs.*, 163 N.L.R.B. 892, 893, 895-896 (1967) (reviewing the 30-year history of a multiemployer bargaining relationship, and, in view of the history of employer withdrawals, permitting a union to withdraw, prior to the commencement of negotiations, with respect to some but not all of the unit employers, subject to the reciprocal right of any or all of the remaining employers to effect a timely withdrawal).

[14] See, *e.g.*, *Pacific Coast Ass'n of Pulp & Paper Mfrs.* v. *NLRB*, 304 F.2d 760, 762-763 (9th Cir. 1962) (employer refusal to bargain about pension issues on a multiemployer basis); *Pacific Coast Ass'n of Pulp & Paper Mfrs.*, *supra*, 163 N.L.R.B. at 894 (several local unions sought a timely withdrawal because of "special problems * * * that have not been given proper attention in the multiemployer unit").

[15] H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 31-32 (1947); S. Rep. No. 105 (Pt. 1), 80th Cong., 1st Sess. 18 (1947).

affirmatively sought to strengthen the voluntary nature of multiemployer bargaining by enacting new measures proscribing union tactics designed to coerce employers to enter into or withdraw from multiemployer bargaining.[16]

On the other hand, the objectives of multiemployer bargaining would be frustrated if the parties were free to withdraw from the unit at will once bargaining has begun. A number of considerations support this conclusion.

First, a reasonable stability in the employer complement is essential since "[t]he parties cannot bargain meaningfully about wages or hours or conditions of employment unless they know the unit of bargaining." [17] Bargaining issues typically present a range of choices that may be differently assessed depending on the particular interests of the employers and employees in the bargaining unit.[18] Who is in the bargaining unit shapes

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[16] Section 8(b)(1)(B) of the Act, 29 U.S.C. 158(b)(1)(B), declared it an unfair labor practice for a labor organization "to restrain or coerce * * * an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." In enacting this measure, "[t]he specific concern of Congress was to prevent unions from trying to force employers into or out of multi-employer bargaining units" *Florida Power & Light Co.* v. *Electrical Workers*, 417 U.S. 790, 803 (1974). See S. Rep. No. 105 (Pt. 1), 80th Cong., 1st Sess. 21 (1947). Further, the secondary boycott provisions proscribe strikes and other coercive conduct by unions where "an object thereof is: (A) forcing or requiring any employer * * * to join any * * * employer organization * * *." Section 8(b)(4)(A) of the Act, 29 U.S.C. 158(b)(4)(A); H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 44-45 (1947).

[17] *Hess Oil & Chemical Corp.* v. *NLRB*, 415 F.2d 440, 449 (5th Cir. 1969), cert. denied, 397 U.S. 916 (1970), quoting from *Douds* v. *Int'l Longshoremen's Ass'n*, 241 F.2d 278, 282 (2d Cir. 1957).

[18] *E.g.*, whether economic gains should be received in the form of higher wages, shorter hours or increased fringe benefits (*NLRB* v. *Crompton-Highland Mills, Inc.*, 337 U.S. 217, 224 (1949)); how seniority should be computed and to what privileges it should attach (*Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 338-339 (1953));

not only the issues that are brought to the bargaining table,[19] but also the nature of the concessions or compromises that each side feels obligated to make in order to secure an agreement.[20] The process of bargaining—weighing the advantages and disadvantages of differing proposals, determining (and redetermining) priorities, and ultimately fashioning a contract package that is acceptable to the principals on both sides—is complex. In multiemployer bargaining that process could become unduly complex, if not futile, unless both sides have assurance that the unit will remain relatively stable during bargaining.

Second, if parties could withdraw from multiemployer units at will after bargaining has commenced, multiemployer bargaining could not serve the objective that Congress intended to achieve—namely, "promoting industrial peace through strengthened collective bargaining." *Buffalo Linen, supra*, 353 U.S. at 95. Negating the reasons which prompt multiemployer bargaining (see note 7, *supra*), such withdrawals would tend to revive fears of competitive disadvantage resulting from differences in wages and working conditions; to imperil tentative agreements already reached in the unit and to impede further bargaining within the unit; to multiply the number of

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whether an increased right to accumulate unused sick leave counterbalances a reduction in the amount of new leave earned each year (*NLRB* v. *Katz, supra*, 369 U.S. at 744).

[19] *E.g., Anderson Lithograph Co.*, 124 N.L.R.B. 920, 923 (1959), enforced *sub nom. NLRB* v. *Jeffries Banknote Co.*, 281 F.2d 893 (9th Cir. 1960) (union's demand for a profit sharing plan was prompted by a particular employer's joining the multiemployer unit).

[20] For example, if some members of an employers' association oppose a concession on an issue of importance to the union, while other members are relatively indifferent, and the association makes this fact known, the union may be encouraged to weaken or trade off some of its other demands in the hope of securing a favorable agreement on this issue. Cf. *Retail Clerks Union, No. 1550* v. *NLRB*, 330 F.2d 210, 215 (D.C. Cir. 1964).

disputes and to retard their peaceful resolution; and, without fair warning, to remove the shelter of multiemployer bargaining from small vulnerable employers who may have been lulled into believing they could rely on each others' strength. In short, "[a] shift in membership after negotiations have begun has lively possibilities for disrupting the bargaining process," and "the potential for disruption is sufficient to justify the Board in adopting a uniform rule for all cases that withdrawal is not timely once bargaining has begun." *NLRB* v. *Sheridan Creations, Inc.*, 357 F.2d 245, 248 (2d Cir. 1966), cert. denied, 385 U.S. 1005 (1967).

Third, permitting withdrawal at will during bargaining would deprive employers, unions, and employees of any fair and certain means for determining the continued legitimacy of the employees' bargaining representative. Under the Board's *Retail Associates* rules, unions, employers, and employees all know with certainty that, once multiemployer bargaining has commenced, the relevant unit for testing the union's majority status, absent unusual circumstances, is the multiemployer unit.[21] By contrast, if employers and unions could withdraw from a multiemployer unit at will during contract negotiations, the boundaries of the multiemployer unit could change from day to day, and neither side would know in advance whether the relevant measure of employee support was an employer unit or the multiemployer unit.[22]

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[21] See *Sheridan Creations, Inc.*, 148 N.L.R.B. 1503, 1505, 1506 (1964), enforced, 357 F.2d 245 (2d Cir. 1966), cert. denied, 385 U.S. 1005 (1967).

[22] Both unions and employers engaged in multiemployer bargaining sometimes seek a momentary tactical advantage by having employee support measured in other than the multiemployer unit. Compare *Retail Associates, supra*, 120 N.L.R.B. at 390-394; *Taylor Motors, Inc.*, 241 N.L.R.B. 711 (1979) (unions bargaining for a multiemployer contract opposed decertification election in the multiemployer unit), with *NLRB* v. *Custom Wood Specialties, Inc., supra*, 622 F.2d at 384-385; *Tobey Fine Papers of Kansas City* v. *NLRB*,

Finally, restricting the withdrawal rights of employers and unions is necessary in order that both sides can be assured of receiving the benefits of the consensual arrangement they freely elected. Neither employers nor unions may insist that the other commence bargaining on a multiemployer basis, and each side has an unlimited right to withdraw from a multiemployer unit before bargaining begins (*supra*, pages 14-16). This freedom afforded the parties supports a rule that, once an unequivocal commitment to be bound by group bargaining is made, it should ordinarily be honored. Otherwise, the legitimate expectations on both sides may be frustrated as one side or the other reneges on its pledge because of disenchantment with the results of bargaining. Collective bargaining is inherently a process where "[t]he complete satisfaction of all who are represented is hardly to be expected" (*Ford Motor Co.* v. *Huffman*, *supra*, 345 U.S. at 338), and parties who voluntarily seek the advantages of group bargaining are reasonably held to assume the ordinary responsibilities and limitations that go with it. *NLRB* v. *Tulsa Sheet Metal Works, Inc.*, 367 F.2d 55, 58 (10th Cir. 1966).

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supra, 107 L.R.R.M. at 2225 (employers bargaining for a multiemployer contract attempted untimely withdrawal in response to decertification activity by the employees of an individual employer in the unit). The Act, however, "is not intended to serve either party's individual interest, but to foster in a neutral manner a system in which the conflict between these interests may be resolved" (*First National Maintenance Corp.* v. *NLRB*, No. 80-544 (June 22, 1981), slip op. 14), and the Board measures both sides' representation claims by the same neutral standard—that of the multiemployer unit. Such a rule is fair to the employees as well, since they receive the benefits of stable labor relations and effective collective bargaining that Congress believed flowed from multiemployer units, and these benefits would be imperiled for all if dissatisfied subgroups within a unit were free to withdraw unilaterally in the midst of bargaining. See, *e.g.*, *NLRB* v. *Brotherhood of Teamsters Local 70*, *supra*, 470 F.2d at 509-510.

B. The Board Has Reasonably Concluded That a Bargaining Impasse Is Not an Exceptional Circumstance Privileging a Unilateral Withdrawal From Multiemployer Bargaining

The Board's *Retail Associates* rules are not inflexible. The rules expressly contemplate that otherwise untimely withdrawals from a multiemployer unit may be excused by "mutual consent" (120 N.L.R.B. at 395).[23] Further, the rules indicate that, even in the absence of the requisite consent, a unilateral withdrawal may be excused if there are "unusual circumstances" (*ibid.*). The Board has found "unusual circumstances" excusing withdrawal where extreme financial pressures, such as impending bankruptcy, threatened an employer's survival.[24] Unilateral employer withdrawal has also been permitted—on the grounds of "unit fragmentation"—in circumstances where the size of the bargaining unit has been drastically reduced as the result of untimely withdrawals to which the union consented[25] or where a union has engaged in a course of conduct that manifested either a clear purpose to destroy the multiemployer unit or an abandonment of multiemployer bargaining.[26] The Board, however, has refused to find that a bargaining impasse is in itself a circumstance that justifies an untimely withdrawal from bargaining; the Board has reasonably con-

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[23] The Administrative Law Judge (Pet. App. 60-62), the Board (Pet. App. 40, 51, 70-71), and the court below (Pet. App. 36-37) found that there was no such consent here, and petitioner does not dispute that finding in this Court.

[24] *United States Lingerie Corp.*, 170 N.L.R.B. 750, 751 (1968); *Spun-Jee Corp.*, 171 N.L.R.B. 557, 558 (1968); *Atlas Electrical Service Co.*, 176 N.L.R.B. 827, 830 (1969).

[25] *NLRB* v. *Southwestern Colorado Contractors Ass'n*, 447 F.2d 968, 969-970 (10th Cir. 1971); *Connell Typesetting Co.*, 212 *N.L.R.B.* 918, 921 (1974).

[26] *Typographic Service Co.*, 238 N.L.R.B. 1565 (1978); *Neville Foundry Company, Inc.*, 122 N.L.R.B. 1187, 1189-1190 (1959).

cluded that the balance of the considerations discussed above does not shift at the time of impasse.

1. An impasse in negotiations occurs when parties reach "deadlock" with "neither party willing to move from its respective position" (*Hi-Way Billboard, Inc., supra*, 206 N.L.R.B. at 23). This occurrence "cannot be said to be an unexpected, unforeseen, or unusual event in the process of negotiations" (*ibid.*). "The parties—even granting the modification of views that may come from a realization of economic interdependence—still proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest" (*NLRB* v. *Insurance Agents' Union*, 361 U.S. 477, 488 (1960)). The Act is predicated on the theory that "free opportunity for negotiation * * * is likely to promote industrial peace and may bring about * * * agreements" (*NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937)), but it requires only that the parties bargain in good faith about terms and conditions of employment (29 U.S.C. 158(d)).

Employers and unions who agree to bargain in a multiemployer unit may reasonably be held to assume the risk of a bargaining impasse, which is part of the normal process of attempting to reach an agreement in collective bargaining. Indeed, many mediators have contended that it is only at the point of impasse—when the parties have exhausted their own efforts to reach agreement—that the intervention of outside mediators is appropriate.[27] Despite the existence of an impasse, a sense of the inevitability of eventual settlement underlies almost all

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[27] See W. Maggiolo, *Techniques of Mediation in Labor Disputes* 14-15 (1971); K. Braun, *Labor Disputes and Their Settlement* 110-111 (1973). Even mediators who would intervene earlier recognize that the suspension of negotiations at impasse is often necessary in order to permit the parties to cool off, and they will themselves suggest that the parties recess. See W. E. Simkin, *Mediation and the Dynamics of Collective Bargaining* 79 (1971).

collective bargaining negotiations.[28] As the Board stated here (Pet. App. 41):

> An impasse is only a temporary "deadlock" or "hiatus" in negotiations which in almost all cases is eventually broken, either through a change of mind or the application of economic force. * * * Suspension of the process as a result of an impasse may provide time for reflection and a cooling of tempers; it may be used to demonstrate the depth of a party's commitment to a position taken in the bargaining; or it may increase economic pressure on one or both sides, and thus increase the desire for agreement. For example, impasse permits the employer to place into effect those wage increases or benefits it has heretofore offered [see note 30, *infra*], an action (or the possibility of it) which may substantially shift the bargaining positions of the parties. In these and other possible uses of impasse as a bargaining tactic, the emphasis is toward achieving agreement rather than causing a permanent disruption of the relation.

The occurrence of an impasse can thus scarcely be considered an "unusual circumstance" similar to those the Board has found sufficient to excuse an untimely withdrawal from the multiemployer unit.[29]

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[28] Simkin, *supra*, at 158-159. "Even when negotiations are in the doldrums and no progress is being made, everybody is aware that this must be temporary. After an unusually frustrating day, a frequent mediator observation is: 'Oh, well, at least we're one day closer to a settlement'" (*id.* at 159).

[29] For this reason, petitioner is incorrect in asserting that the refusal to recognize a right of withdrawal on impasse requires "adherence to a multiemployer unit long after meaningful collective bargaining within that framework has become nothing more than an exercise in futility" (Br. 35). See also Amicus Curiae Graphic Arts Union Employers of America Br. 11-15. Moreover, fragmentation of a unit merely because of frustration over the conduct of particular negotiations disserves other interests furthered by multiemployer bargaining (see note 7, *supra*).

2. Indeed, the practicalities of bargaining show that impasse should not be held to justify such withdrawal.[30]

a. The problem of deciding whether the parties have reached impasse "is often difficult for the bargainers and is necessarily so for the Board." *Dallas General Drivers, Local Union No. 745* v. *NLRB*, 355 F. 2d 842, 844 (D.C. Cir. 1966); see Amicus Curiae United Mine Workers of America Brief at 11-13. Impasse may be reached quickly or after extended negotiations.[31] It may persist for a

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[30] In the context of single-employer bargaining, neither the Board nor the courts have ever held that impasse was a circumstance justifying similar fundamental changes in the bargaining relationship, although it does signal certain changes in the parties' bargaining obligation. When such a deadlock is reached, the duty to meet and bargain about the subject matter of the impasse is suspended until such time as there is a reasonable basis to believe that an agreement might be possible. See, *e.g.*, *NLRB* v. *Webb Furniture Corp.*, 366 F.2d 314, 315-316 (4th Cir. 1966); *Transport Company of Texas*, 175 N.L.R.B. 763, 767-768 (1969), enforced, 438 F.2d 258 (5th Cir. 1971). Further, once impasse results, the employer, having satisfied its bargaining obligation with respect to the subjects of the impasse, is free unilaterally to implement the terms and conditions it previously proposed to the union. See, *e.g.*, *American Fed'n of Television & Radio Artists* v. *NLRB*, 395 F.2d 622, 624 (D.C. Cir. 1968); *Bi-Rite Foods*, 147 N.L.R.B. 59, 64-65 (1964). Impasse also defines the limits to which either side may press discussion of nonmandatory subjects of bargaining. See *NLRB* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342 (1958).

[31] *E.g.*, *Dalton Brick & Tile Corp.*, 126 N.L.R.B. 473, 478-480 (1960), enforcement denied on other grounds, 301 F.2d 886 (5th Cir. 1962) (impasse after two meetings; agreement reached two months later, following a lockout by the employer); *Taft Broadcasting Co.*, 163 N.L.R.B. 475 (1967), aff'd *sub nom. American Fed'n of Television & Radio Artists* v. *NLRB*, 395 F.2d 622 (D.C. Cir. 1968) (impasse reached after some 25 negotiating sessions held over a six-month period; employee strike settled some six months later); *NLRB* v. *Hi-Way Billboards, Inc.*, 473 F.2d 649, 651-652, 655 (5th Cir. 1973) (impasse reached after 13 meetings in a two-month period; following an employee strike, agreement reached within two weeks).

considerable period and then break suddenly, surprising even the participants.[32]

b. Moreover, if withdrawal were permitted at impasse, the parties would bargain under the threat of withdrawals by those who were not completely satisfied with the results of the negotiations.[33] Such a rule would thus invite the parties to use the scope of the unit as a "bargaining lever"—a result that is contrary to sound principles consistently approved in the multiemployer context.[34]

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[32] See, *e.g.*, *Bill Cook Buick*, 224 N.L.R.B. 1094, 1095 (1976) (after five months without movement on the major issues, notwithstanding a three-month strike, both sides made concessions and quickly reached agreement). See also J. Carpenter, *Employers' Associations and Collective Bargaining in New York City* 208-209 (1950):

> Major strikes * * * become a battle of resources for the union as well as the associations. * * * More than one association * * * has discovered to its surprise [after yielding] that if its members had held together a few days longer, the association would have broken the back of union resistance.

Similar experience underlies the admonition (B. Morse, *How to Negotiate the Labor Agreement* 63 (1974)) that a negotiator should never make a concession without first checking whether the other side has not itself decided to yield the issue.

[33] Cf. *NLRB* v. *Independent Ass'n of Steel Fabricators*, *supra*, 582 F.2d at 146-147, where the court found that, because the union refused to yield the advantages it had gained in previous bargaining, thereby disappointing the expectations of the employers in the multiemployer unit, "the Association was useless as a bargaining device." The court accordingly permitted untimely withdrawal from the unit.

[34] *NLRB* v. *Sheridan Creations, Inc.*, *supra*, 357 F.2d at 248; *NLRB* v. *Johnson Sheet Metal, Inc.*, *supra*, 442 F.2d at 1059; *McAx Sign Co.* v. *NLRB*, *supra*, 576 F.2d at 67-68; *Carvel Co.* v. *NLRB*, *supra*, 560 F.2d at 1033. The bargaining unit is the framework for mandatory bargaining; normally, it is not itself a subject of mandatory bargaining, and a threat unilaterally to alter the boundaries of a multiemployer unit during bargaining (and thereby to inhibit or obstruct the process of bargaining) is an impermissible tactic. See *Newspaper Printing Corp.* v. *NLRB*, 625 F.2d 956, 963

Indeed, given the typical pattern of bargaining, such a rule would provide a device whereby the parties could realistically hope to get the best of both worlds: an agreement in the multiemployer unit if satisfied with its terms, and an opportunity to escape the unit entirely if it appeared that the agreement would be less favorable than expected. Experienced negotiators typically take firm positions at the outset in order to test the limits of their opponent's position, and "[t]o this end, compromises are usually made cautiously and late in the process." [35] Simply by refraining from making a concession, either side could precipitate an impasse and escape from the unit.[36]

c. It is precisely at and during impasse—when bargaining is temporarily replaced by economic warfare—that the parties' need for a stable, predictable bargaining unit is most acute. Before impasse, parties involved in multiemployer bargaining ordinarily will have made concessions, reached some tentative agreements, and possibly resorted to various economic weapons or weathered the other parties' use of such weapons.[37] In taking such ac-

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(10th Cir. 1980); *Newport News Shipbuilding & Dry Dock Co.* v. *NLRB*, 602 F.2d 73, 76 (4th Cir. 1979); *General Drivers & Helpers Union Local No. 554* v. *NLRB*, 522 F.2d 562, 565-567 (8th Cir. 1975); *Douds* v. *Int'l Longshoremen's Ass'n*, *supra*, 241 F.2d at 281-283.

[35] *Local 13, Detroit Newspaper Printing Union* v. *NLRB*, 598 F.2d 267, 273 (D.C. Cir. 1979).

[36] Accordingly, the Board in this case (Pet. App. 47) respectfully disagreed with the view, stated by the Third Circuit in *NLRB* v. *Beck Engraving Co.*, *supra*, 522 F.2d at 483, that impasse is "an event which neither [side] can manipulate * * *."

[37] There is nothing inconsistent in applying economic pressure at the same time the parties are engaged in bargaining. See *NLRB* v. *Insurance Agents' Union*, *supra*, 361 U.S. at 479, 489, 490. Thus, employers may lock out and employees may strike before impasse is reached. *See Darling & Co.*, 171 N.L.R.B. 801, 802-803 (1968), aff'd *sub nom. Lane* v. *NLRB*, 418 F.2d 1208 (D.C. Cir. 1969); *NLRB* v. *Safeway Steel Scaffolds Co.*, 383 F.2d 273, 280 (5th Cir. 1967); *Callier's Custom Kitchens*, 243 N.L.R.B. No. 143, 102 L.R.R.M. 1008, 1009 (1979), enforced, 630 F.2d 595 (8th Cir. 1980).

tions—and in refraining from other actions—the parties rely upon the existence of the established multiemployer unit in weighing the costs and possible benefits of their conduct. The partial or complete destruction of that unit by unlimited unilateral withdrawals at or during impasse would not only tend to unsettle any tentative agreements or mutually dependent compromises that may have been reached in prior bargaining, but also would be unfair to the other parties who had applied or withstood economic pressure in support of the unit-wide bargaining demands.[38] Further, since both employers and unions plan their bargaining strategy on the basis of their estimates of the sources and extent of employee support in the unit, allowing unlimited unilateral withdrawals at or during impasse would unfairly deny the parties a predictable basis for calculating the union's continued majority support in the unit.[39]

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[38] For example, here the other members of the Association responded to the Union's strike against petitioner by a lockout (Pet. App. 57; A. 94).

[39] Amicus Curiae Graphic Arts Union Employers of America notes (Br. 12-13) that the Board will permit a union's representative status to be challenged after a contract has expired and, if such challenge is made, will permit a unilateral suspension of bargaining negotiations until the matter is resolved. It contends that this is more destructive of collective bargaining than is a rule which would permit an employer to withdraw from a multiemployer unit after an impasse has been reached in the negotiations, for the latter rule merely seeks an alternative method of bargaining (*i.e.*, in a single employer, rather than a multiemployer, unit), not its total suspension. "This is to make situations that are different appear the same" (*Brooks* v. *NLRB*, 348 U.S. 96, 104 (1954)). Where the union's status as the representative of the bargaining unit employees is properly called into question, it effectuates the policies of the Act to defer negotiations until that issue is resolved, because there would be no duty to bargain if the union in fact has lost the support of a majority of unit employees. On the other hand, where there is no valid reason to doubt that the union continues to represent a majority of the employees in a multiemployer unit, the only justification for permitting withdrawal is to afford an employer who wishes to leave the multiemployer unit,

For all these reasons, the Board is amply warranted in concluding that a bargaining impasse is not an unusual circumstance which would justify withdrawal from a multiemployer bargaining unit. It "is but one thread in the complex tapestry of collective bargaining rather than a bolt of a different hue." *Hi-Way Billboards, Inc., supra*, 206 N.L.R.B. at 23.

C. The Fact That a Union May Enter Into Interim Agreements With Individual Employers During a Strike Does Not Warrant a Rule Permitting Employers Unilaterally to Withdraw at Impasse

Although petitioner urges acceptance of the "impasse doctrine" to justify its unilateral withdrawal from the multiemployer unit, petitioner's arguments (Br. 14-15, 26-35), like those in the judicial decisions on which it relies,[40] focus not on the nature of impasse or its place in the collective bargaining process but on the alleged unfairness of the Board's rules. That is, petitioner contends that, since the Board permits the union to enter into separate "interim agreements" with some of the employer members of a multiemployer unit, which allow them to resume operations while a strike continues against the other members and pending the negotiation of a final agreement covering the multiemployer unit,[41] it is unfair

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and bargain on an individual basis, full freedom to do so. The Board could reasonably conclude that to afford the individual employer this freedom after negotiations have commenced and merely because they have reached an impasse, would be unduly destructive of the congressional objective of fostering collective bargaining through multiemployer units.

[40] *NLRB* v. *Hi-Way Billboards, Inc.*, 500 F.2d 181 (5th Cir. 1974); *NLRB* v. *Associated Shower Door Co.*, 512 F.2d 230 (9th Cir.), cert. denied, 423 U.S. 893 (1975); *NLRB* v. *Independent Ass'n of Steel Fabricators*, 582 F.2d 135 (2d Cir. 1978), cert. denied, 439 U.S. 1130 (1979); *NLRB* v. *Beck Engraving Co.*, 522 F.2d 475 (3d Cir. 1975).

[41] See *Sangamo Construction Co.*, 188 N.L.R.B. 159 (1971); *Plumbers & Steamfitters Union No. 323 (P.H.C. Mechanical Contractors)*, 191 N.L.R.B. 592, 596 (1971).

not to permit an employer unilaterally to withdraw from the unit after an impasse in the negotiations is reached.

In the present case, the Board found (Pet. App. 51), and the court below agreed (Pet. App. 33), that "no interim agreements were made or even attempted." But, in *Beck*, *supra*, the Third Circuit was of the view that the mere *possibility* that a union might enter into interim agreements would give it "a tremendous bargaining advantage and leverage" (522 F.2d at 483) that should be equalized by a rule permitting employers to withdraw from a multiemployer unit at any time during a bargaining impasse.[42] In light of *Beck*, the court below found it necessary to address the interim agreements question (Pet. App. 33-36; but cf. Pet. App. 37 (concurring opinion)). Having done so, it correctly concluded that interim agreements of the sort the Board has approved are a legitimate form of economic pressure, and that the Board therefore properly declines to disapprove them, either directly by finding them to be unfair labor practices or indirectly by withholding otherwise available unfair labor practice remedies against employers who untimely withdraw from multiemployer bargaining.

The *Beck* court found interim agreements objectionable on the ground that they enabled the union to "whipsaw the remaining employers of the bargaining unit," thereby "strengthen[ing] the union's hand vis-a-vis those employers who continue to bargain within the unit" (522 F.2d at 482-483). The court further stated that negotiating such agreements "is tantamount to a rejection of the

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[42] As the court below correctly observed (Pet. App. 27-29, 33), the absence of any interim agreements here serves to distinguish the other cases relied on by petitioner—*Hi-Way Billboards*, *Associated Shower Door*, and *Independent Ass'n of Steel Fabricators*—since in all of those cases the courts relied in whole or significant part on the fact that the union objecting to the untimely withdrawal of certain employers had itself entered into separate agreements with individual members of the employer association. See also Murphy, *Impasse and the Duty to Bargain in Good Faith*, 39 U. Pitt. L. Rev. 1, 55, 60 (1977).

existence of the multi-employer bargaining unit" and that the Board's approval of this additional weapon in the union's arsenal required that the employer be granted "an equivalent right" of unilateral withdrawal from the unit (*id.* at 483). Accordingly, the court held that "[t]he rights of the parties should accrue simultaneously based upon the occurrence of an event which neither can manipulate (e.g., impasse)" (*ibid.*). This reasoning does not withstand analysis.

Initially, as the court below held (Pet. App. 34), even if some right of withdrawal were necessary to counterbalance the union's ability to negotiate interim agreements, there would be little reason to link it to the existence of an impasse. As shown (*supra*, pages 24-25), it is not true, as *Beck* assumed, that impasse is an event neither side can manipulate. Moreover, because employers may lock employees out and employees may strike prior to impasse (*supra*, note 37), interim settlements of these economic conflicts are often reached prior to impasse. The Board's approval of interim agreements has accordingly not been limited to situations where those agreements were entered into after impasse.[43] For the reasons discussed above, neither party's right to withdraw from the unit should be based on the existence of an impasse.

In any event, interim agreements of the kind the Board has approved are not the equivalent of unilateral withdrawal from a multiemployer unit. As the Board emphasized here (Pet. App. 47-48), it has approved interim agreements only in situations where employees work dur-

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[43] *Callier's Custom Kitchens, supra*, 243 N.L.R.B. No. 143, 102 L.R.R.M. at 1010 n.6, 1011-1012, noting that interim agreements of the sort executed by the union "serve the necessary and useful purpose of encouraging movement and compromise and, thus, avoiding deadlocks in negotiations"; *Sangamo Construction Co., supra*, 188 N.L.R.B. at 160, dismissing unfair labor practice charges directed at an interim agreement, when bargaining continued throughout the period that the agreement was in operation.

ing the strike either under the terms of the expired contract (*Sangamo Construction Co., supra*), or under the terms that the union had previously offered to the employers' association and the association had rejected (*P.H.C. Mechanical Contractors, supra*). In either case, the parties mutually recognize that these terms are temporary, pending the outcome of the group bargaining, and that any contract reached in the multiemployer unit will ultimately govern all employer-employee relationships in that unit.[44] Such agreements are in sharp contrast to final separate agreements with members of the multiemployer unit. Indeed, where union efforts to negotiate such separate agreements have resulted in the fragmentation of the unit, the Board has excused untimely withdrawals from multiemployer groups. See *Connell Typesetting Co., supra*, 212 N.L.R.B. at 921; *Typograhic Service Co., supra*, 238 N.L.R.B. at 1565-1566. Compare *Tobey Fine Papers of Kansas City*, 245 N.L.R.B. No. 181, 102 L.R.R.M. 1343, 1344-1345 (1979), enforced on other grounds, 107 L.R.R.M. 2221 (8th Cir. 1981) (refusing to find fragmentation where the employers did not object to the separate agreements by filing unfair labor practice charges and did not rely on them in later withdrawing from the unit).

The Board has thus approved only interim agreements that respect the superior authority of the multiemployer association to negotiate a final contract controlling the relations of the unit employers and employees for the contract term. Because such agreements are avowedly subordinate to the unit-wide contract, they are not inconsistent with the commitment to be bound by group action

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[44] Petitioner inaccurately states that the conclusion of a separate interim agreement shows "an employer is breaking away from the group to bargain individually with the union" (Br. 33). See also Graphic Arts Br. 15-19. These agreements do not contain any special provisions worked out between the union and the individual employer, nor do they offer the agreeing employer any long term benefits not available to the other association members.

in bargaining. Moreover, unlike unilateral withdrawals or separate final agreements, such interim agreements do not change the boundaries of the unit, and, since the signers thereof know they will be bound by the results of group bargaining, they retain a vested interest in the outcome of the multiemployer negotiations.[45] Finally,

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[45] By contrast, separate final agreements breach the commitment to be bound by group action in bargaining upon which the multiemployer unit is founded and deny the authority of the employer association to bind each employer member to the final contract. If such separate final agreements were deemed lawful, then, under Section 8(d) of the Act, 29 U.S.C. 158(d), neither the union nor the individual employer would have a right to require the other to "terminate or modify such contract" during its term. Accordingly, to the extent that the separate contract was different from the one governing the multiemployer unit, that difference could endure for the contract's term, and a central purpose of multiemployer bargaining—"avoiding the competitive disadvantages resulting from nonuniform contractual terms" (*Buffalo Linen, supra*, 353 U.S. at 96)—would be frustrated.

Since separate final agreements do tend to undermine the multiemployer unit, the Board has held that an employer and a union violate, respectively, Sections 8(a)(5) and 8(b)(3) of the Act, 29 U.S.C. 158(a)(5) and 158(b)(3), if, without the consent of the multiemployer group, they enter into a separate final contract that is not intended to be superseded by the contract worked out in the multiemployer unit. *Teamsters Local 378 (Olympia Automobile Dealers Ass'n)*, 243 N.L.R.B. No. 138, 102 L.R.R.M. 1007 (1979), enforcement pending, No. 79-7683 (9th Cir., argued Nov. 5, 1980). As the Board explained in *Callier's Custom Kitchens, supra*, 243 N.L.R.B. No. 143, 102 L.R.R.M. at 1011 n.8:

> The essence of multiemployer bargaining is a consensual, tripartite relationship between the union, the multiemployer bargaining association, and the individual employer-members of the association. * * * Each essential party to multiemployer bargaining * * * has a stake not only in the results of multiemployer bargaining, but in the multiemployer unit's membership composition as well. Recognition of the nature of multiemployer bargaining and the relationship between the parties has prompted the Board to find that, once multiemployer bargaining has begun, the multiemployer association has the right to restrain an individual employer-member from

because interim agreements are a means whereby particularly vulnerable employers may avoid exceptional hardship during a strike,[46] they provide useful flexibility in multiemployer bargaining, and indeed may forestall situations where employers are forced to withdraw from the unit in order to survive economically (*supra*, page 20, note 24).

To be sure, interim agreements may create a whipsaw pressure on the remaining employers to agree to the union's demands within the unit. In this respect, they closely resemble a selective strike.[47] However, as the court below correctly observed, "the uneven application of economic pressure *per se* is not inconsistent with multiemployer bargaining (Pet. App. 33). Cf. *Buffalo Linen*, *supra*, 353 U.S. at 89-90, 94 n. 22. The whipsaw pressure on the remaining members of an employer association from interim agreements by some members is analytically no different from the pressure that results

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defecting from the multiemployer fold and proceeding to negotiate and enter into a separate, final agreement with the union.

On the basis of this analysis, the separate agreement reproduced at SA 4-6 of the Graphic Arts Brief might well be found to be a violation of Sections 8(a)(5) and 8(b)(3) to the extent that it preserves special benefits to the individual employer after the conclusion of the multiemployer agreements (see Graphic Arts Brief 15-16, 19-20).

[46] *E.g.*, *P.H.C. Mechanical Contractors*, *supra*, 191 N.L.R.B. at 593 (employer performing a contract with a time penalty clause for nonperformance at the time of the strike).

[47] They are indeed typically a means of implementing a selective strike. For example, the union may announce that it will strike all the employers in the unit who do not sign interim agreements embodying the terms of the union's final offer to the association, or it may announce its willingness to abandon an ongoing strike with respect to all employers who will sign such an interim agreement. See, *e.g.*, *Callier's Custom Kitchens*, *supra*, 243 N.L.R.B. No. 143, 102 L.R.R.M. at 1009; *Seattle Auto Glass*, 246 N.L.R.B. No. 21, 102 L.R.R.M. 1376, 1377 (1979), petition for review pending, No. 79-7603 (9th Cir., argued Nov. 5, 1980).

when some members refuse to join in a lockout in response to a selective strike.[48]

Finally, contrary to the Third Circuit's position in *Beck*, it is not invariably true that the individual agreement gives the union a forceful weapon against the employers who continue to bargain within the unit (522 F.2d at 483).[49] In any event, under a system of collective bargaining where the substantive terms of the employment relationship are resolved in accordance with the relative economic strength of the participants, *NLRB* v. *Insurance Agents' Union*, *supra*, 361 U.S. at 488-490, 495, both sides, absent proof of unlawful motivation, have great leeway in exerting concurrent economic pressures on each other. The "Board's statutory mandate is to balance, not economic weapons, but 'conflicting legiti-

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[48] As the court below added (Pet. App. 33 n.18), just as these employers who refuse to join a lockout and thereby remain in operation "could prevent any whipsaw by engaging in the lockout," employers who sign interim agreements could avoid a whipsaw "by refusing to negotiate such agreements." Petitioner's assumption that the interim agreement is a weapon solely within the control of the union is therefore incorrect (Br. 26-27; cf. Graphic Arts Br. 15).

[49] The potency of the interim agreement, like that of any other economic weapon, will vary with the circumstances. Doubtless a union will often hope that the uneven economic pressure on the association that can result from such agreements will lead to a quick capitulation to its demands, and, when the association is divided and unwilling to lock out or endure a strike, this may be the result. On the other hand, when the employer association is strongly united, the signing of an interim agreement may have no impact whatsoever on the association's determination to resist the union's demands (see *P.H.C. Mechanical Contractors*, *supra*, 191 N.L.R.B. at 592-594), and the eventual contract settlement may be on terms more favorable to the employers than the interim agreements, requiring the union to give up its temporary gains (see *Associated Shower Door Co.*, 205 N.L.R.B. 677, 679-680 (1973), enforced on other grounds, 512 F.2d 230 (9th Cir.), cert. denied, 423 U.S. 893 (1975)).

mate interests'" (Pet. App. 50).[50] The Board has reasonably balanced those interests in distinguishing between separate interim agreements and separate final agreements. As the Fifth Circuit concluded, after reconsidering its *Hi-Way Billboards* decision (*NLRB* v. *Marine Machine Works, Inc., supra*, 635 F.2d at 525-526 (footnote omitted)):

> [T]he Board has wisely weighed the competing policy concerns. The Board's rules balance an individual party's legitimate interest in striking its own separate bargain against the parties' and the public's legitimate interest in achieving the benefits afforded by continued multiemployer bargaining, including avoiding the industrial strife likely to result from frustration of the bargaining process. In reaching this balance, the Board is treating both unions and employers equally and fairly. The Board permits each to use all available economic weapons in aid of reaching an overall settlement. On the other hand, the Board prohibits each from taking action that is destructive of the multiemployer unit: unions may not seek to negotiate separate permanent agreements with employers, and employers may not withdraw from the unit and seek separate permanent negotiations with the union. This result is well within the Board's broad discretion to resolve the inevitable questions arising in the multiemployer bargaining context.

In sum, the Board's conclusion that an employer may not unilaterally withdraw from a multiemployer unit solely because of an impasse in negotiations with the bargaining representative of the unit employees is a reasoned application of the policies of the Act (see *Beth*

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[50] For these reasons, the Board (Pet. App. 50-51), in assessing the propriety of interim agreements, correctly dissociated itself from the weapon-counting approach of the *Beck* court ("[t]he union * * * should not have been given two weapons for its economic arsenal (*i.e.*, the selective strike and individual negotiations) while the employers are given only one (viz., the lockout)," 522 F.2d at 483).

Israel Hospital v. *NLRB*, 437 U.S. 483, 499 (1978); *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 497 (1979)) in an area that Congress "intended to leave to the Board's specialized judgment" (*Buffalo Linen, supra*, 353 U.S. at 96), and therefore is entitled to acceptance.[51] The court below thus properly sustained the Board's finding that petitioner violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by refusing to execute the collective bargaining agreement reached between the Union and the Association.

CONCLUSION

For the foregoing reasons, the judgment of the court below enforcing the Board's order should be affirmed.

Respectfully submitted.

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JULY 1981

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[51] The need for expert judgment in this area is emphasized by the fact that both petitioner and the unions claim that the adoption of the particular position they espouse is necessary to preserve the viability of multiemployer bargaining. Compare Pet. Br. 9, 15, 26 with Teamsters Br. 6-7, 10-12 and United Mine Workers Br. 11-13.

APPENDIX

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are as follows:

SEC. 2. When used in this Act—

(1) The term "person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

* * * * *

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce * * * (B) an employer in the selection of his representatives for

the purposes of collective bargaining or the adjustment of grievances;

* * * * *

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a);

* * * * *

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(A) forcing or requiring any employer or selfemployed person to join any labor or employer organization * * *

* * * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: * * *

* * * * *

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: * * *

* * * * *

SEC. 10. (c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

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No. 80-931

In the Supreme Court of the United States

October Term, 1980

CHARLES D. BONANNO LINEN SERVICE, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

TEAMSTERS LOCAL UNION NO. 25, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,
Intervenor.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MOTION OF GOLDEN BEAR MOTORS, INC., d/b/a GOLDEN BEAR FORD, GIL ASHCOM TOYOTA, BERKELEY LINCOLN MERCURY, INC., for leave to file brief

HOYT & GOFORTH
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No. 80-931

In the Supreme Court of the United States

October Term, 1980

CHARLES D. BONANNO LINEN SERVICE, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

TEAMSTERS LOCAL UNION NO. 25, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,
Intervenor.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MOTION OF GOLDEN BEAR MOTORS, INC., d/b/a GOLDEN BEAR FORD, GIL ASHCOM TOYOTA, BERKELEY LINCOLN MERCURY, INC., for leave to file brief

AMICUS CURIAE

Pursuant to Rule 42 (3) of the Rules of this Court, Golden Bear Motors, Inc., d/b/a Golden Bear Ford, Gil Ashcom Toyota, Berkeley Lincoln Mercury, Inc., move the court for leave to file a brief amicus curiae

in the above entitled case. Counsel for Petitioner, Bonanno, replied affirmatively to movant's letter of April 29, 1981. A confirming letter has been received and is attached as Exhibit A.

The Solicitor General replied affirmatively to movant's letter of April 29, 1981, and a confirming letter is attached as Exhibit B. Counsel for Intervenor, Teamsters Local Union No. 25, failed to respond to movant's letter of April 29, 1981.

INTEREST OF GOLDEN BEAR MOTORS, INC., d/b/a GOLDEN BEAR FORD, GIL ASHCOM TOYOTA & BERKELEY LINCOLN MERCURY.

The question presented in the instant case is a matter of continuing importance to movants. Briefly stated, the question is: does an "impasse" in negotiations constitute an unusual circumstance permitting withdrawal by an employer from multi-employer bargaining?

Multi-employer groups vary greatly in size, type of industry and in the strengths of various member employers. The interest of movants is predicated on the substantial and far reaching consequences that any decision here may have on such a highly diverse and rapidly changing industry as new car sales in contract negotiations, thereby becoming obligated to an agreement and a method of negotiations not suited to individual needs. For these reasons movants request this opportunity to present their views.

CONCLUSION

For the above stated reasons we respectfully urge the Court to grant this motion for leave to file the accompanying *Amicus* brief in the present case in support of the position of the Petitioner.

Respectfully submitted,

RALPH B. HOYT
of HOYT & GOFORTH
Counsel for:
Golden Bear Ford, Gil Ashcom Toyota, and Berkeley Lincoln Mercury

BRIEF OF GOLDEN BEAR MOTORS, INC., d/b/a GOLDEN BEAR FORD, GIL ASHCOM TOYOTA & BERKELEY LINCOLN MERCURY

INTEREST OF AMICUS CURAIE

The interest of Amicus Curiae is set out in the Motion for Leave to File supra.

THE QUESTION PRESENTED

Whether an impasse reached in negotiations enables an employer to unilaterally withdraw from a multi-employer bargaining unit and thereafter negotiate with the union on an individual basis.

ARGUMENT

An impasse in negotiations justifies withdrawal from a multi-employer bargaining unit.

A. INTRODUCTION

The court below found it impermissible for Charles D. Bonanno Linen Service to withdraw from multi-employer bargaining upon the occurrence of impasse in negotiations.

The court will be called upon to examine the right of withdrawal from a multi-employer bargaining unit. An opportunity is afforded the Court to resolve a conflict between the competing bargaining strengths of the employers and the union in multi-employer bargaining.

B. THE OCCURRENCE OF AN IMPASSE IN NEGOTIATIONS JUSTIFIES WITHDRAWAL FROM A MULTI-EMPLOYER UNIT

1. The Court below in deciding against the employer relied heavily on what it perceived to be the public and private interests served by multi-employer bargaining.

The Court below listed the following as interests served by such bargaining:

1. It enables smaller employers to bargain on an equal basis with larger employers;

2. It facilitates development of benefit programs;

3. It encourages a more flexible attitude in bargaining as both sides can make concessions without the fear that by doing so they will become less competitive or that in the case of the union, it's members will be dissatisfied in not having received the same benefits as won from other employers; and

4. Multi-employer bargaining reduces industrial strife.

The Court below fails both to address the flaws of multi-employer bargaining and to recognize the realities of the situation.

To begin, multi-employer bargaining was a product of its times. It permitted weaker employers to join together to bargain with stronger unions. Multi-employer bargaining enjoyed its greatest popularity

approximately forty years ago. Since that time its popularity has faded as times changed. Small employers today can sign what is commonly known as a "subscriber's agreement" to the industry contract. Therefore, they no longer have to fear being forced into a less competitive contract than other employers; further, with the inception of the concept of a subscriber's agreement, small employers need not expend time or money to negotiate a contract with a union unless they so desire. Thus, the argument of the Court below that multi-employer bargaining enables small employers to bargain on an equality basis with larger employers is incorrect and not reflective of today's practice of labor law.

The further argument of the Court in favor of protecting the sanctity of multi-employer bargaining is it assists in developing benefit programs. This argument also does not address reality. It was true that thirty to forty years ago benefit programs for employees were not plentiful. However, the last twenty years has seen the growth of an aggressive insurance industry providing many and varied health and pension programs for employees. These private insurance companies often tailor benefit programs to fit the individual employer making them more affordable than union plans which do not have to be concerned with cost competitiveness with other plans.

The Court below also found that multi-employer bargaining fosters a more flexible attitude in nego-

tiations so that greater concessions can be made without fear of being less competitive or that union members will be dissatisfied because they do not have the same benefits as members employed elsewhere.

With regards to employer fears of loss of competitiveness, it is antithical to the free enterprise system to have uniform wages and benefits. Such uniformity in monetary concerns forms collusion against the consumer and is anti-competitive.

The concern that unequal salaries and benefits among employers will cause employee dissatisfaction against their union is specious. A union should not need the assistance of the government to have satisfied members. A union should be viewed like any other business providing a service. If the service isn't satisfactory to its members, then other means of redress rather than governmental favoritism of multi-employer bargaining, is appropriate.

The final interest the Court below felt was served by multi-employer bargaining was a decrease in industrial strife. The court below reasoned that because employers are negotiating together if there is a strike there will be only one rather than several.

Again the court failed to grasp reality. Rather than a strike against one or a small number of employers you have a strike against *all* employers in an industry, virtually paralyzing it. Instead of a minor incovenience to the public in having, as example, a

handful of grocery stores struck, you have all the stores struck creating a major shortage. Or as happened in the airline industry, instead of one or two airlines being struck, all domestic carriers were struck leaving many thousands of passengers stranded. The result of just such a strike in the airline industry was the abandoning of multi-employer bargaining for individual bargaining.

If impasse is not recognized as an unusual circumstance by this court, the result may very well be the same. Leaving multi-employer bargaining in the eyes of employers as an unsatisfactory method of negotiations because of the unequal bargaining strengths given to the parties.

2. There is no practical difference between an interim and a final agreement.

The Court below ruled that impasse is not sufficient justification to permit employer withdrawal. The argument of the employer and the rational of numerous appellate courts in permitting withdrawal following an impasse was that the union would be given an unfair advantage at any time during the negotiations by strategically selecting employer bargaining unit members with whom to negotiate a final agreement, thus weakening and fragmenting the employer unit. The union, and rightly so, was perceived to have an unfair advantage based on greater bargaining strength. It was thus determined by several courts that the arsenal of economic weapons afforded the

parties must be equaled and ruled that the employer would be granted another economic weapon namely, the ability to withdraw from the unit following impasse.[1]

The National Labor Relations Board has subsequently rethought its position regarding a union's ability to negotiate individual contracts with member employers. The Board now holds to the premise that with regards to unusual circumstances which justify withdrawal from multi-employer bargaining it will distinguish between tactics "which contemplate adherence to a final unit-wide contract and are thus not antithetical to group bargaining and [those] which are clearly inconsistent with, and destructive of group bargaining."[2] In other words, interim contracts are permissible but final contracts are not.

But, in actual terms, is there any difference in the practical effect they have on a multi-employer unit? It is the position of the employers herein that there is no difference. No mater what type of bargain is struck, interim or final, the effect is the same; the bargaining unit is fragmented.

The union still has the decided benefit of being able to determine when and whom it will negotiate a

[1] *NLRB* v. *Associated Shower Door Co.*, 512 F.2d 230 (9th Cir. 1975), cert. denied, 423 U.S. 893; *NLRB* v. *Independent Association of Steel Fabricators*, 582 F.2d 475 (3rd Cir. 1978); *NLRB* v. *Beck Engraving Co.*, 522 F.2d 475 (3rd Cir. 1975); *NLRB* v. *Highway Billboards, Inc.*, 500 F.2d 181 (5th Cir. 1974; *Fairmont Foods Co.* v. *NLRB*, 471 F.2d 1170 (8th Cir. 1972).

[2] *Joseph D. Bonanno Linen, Inc.*, 102 LRRM at 1004.

side agreement with, thus relieving that employer from the threat of economic action and placing a greater burden on the remaining employer members who, if struck, will stand by and watch their competitor continue unhindered in business because they had the good fortune of being chosen by the union to be the beneficiary of any interim agreement.

The most cogent analysis of the problem is found in *NLRB* v. *Beck Engraving Co.*, 522 F.2d 475 (3rd Cir.) wherein it was decided that impasse standing alone, constituted "unusual circumstances" within the meaning of *Retail Associates*, (120 NLRB 388 (1958)).

The Court in *Beck Engraving*, supra, citing *NLRB* v. *Truck Drivers Local 499*, (353 U.S. 87 (1957), [Buffalo Linen]) recognized that multi-employer bargaining contributes to labor stability and realized that "the ultimate problem is the balancing of the conflicting legitimate interests." *Buffalo Linen*, supra.

The Court further noted that in the *Evening News Association* (154 NLRB 1484 (1965) enf'd 372 F.2d 569 [6th Cir. 1967]), ibid, "the Board espoused the tenet that identical principles regarding multi-employer bargaining and withdrawals *will be applied equally* to the union and the individual employers." *Beck*, supra, (emphasis added). The Court found further that the "even-handed principle" or parity principle, had been followed by the Board in substan-

tially all of its decisions in applying the *Retail Associates* rule to the union as well as the employer, but the Court noted with disapproval that the Board had strayed from and seemingly abandoned this principle by giving "its imprimatur to the union's negotiation of interim, separate agreements with individual members of the multi-employer bargaining unit," *Beck*, supra. The immediate impact of this policy was to give an undue and unnecessary advantage to the union by strengthening the union's hand vis-a-vis those employers remaining with the multi-employer bargaining unit. By allowing the union two economic weapons (strike and interim agreements) while allowing the employers only one (the lockout) the Board had tipped the balance of equality in favor of the unions, giving them an unfair advantage in negotiations.

Based on the above arguments, the *Beck* Court found that an impasse reached during good faith negotiations is indeed an "unusual circumstance" permitting unilateral withdrawal by both sides.

The Labor Board argues that its reconsideration of *Charles D. Bonanno*, 243 NLRB No. 140, 102 LRRM 1003 (1979) should be adopted as it fosters labor stability.

In its reconsideration of the *Bonanno* decision, supra, the Board makes a distinction between "interim agreements" and "final agreements," reasoning that the former do not fragment the unit while the latter

do. The Board acknowledges however, that under either type of agreement the remaining employers in the multi-employer bargaining unit can be "whipsawed," "however, [such tactics] are part and parcel of multi-employer bargaining," and should not be taken to equate their use with rejection of the multi-employer unit and "is not inconsistent with an overall agreement." The Labor Board has failed to in any way explain why such agreements, whether interim or not, do not fragmentize the unit and what should be the result if they do. More importantly, the Labor Board has not squarely addresssed the *Beck* Court's concern about the failure of the Board to continue to adhere to its parity principle as stated in *Evening News Association*, supra. The NLRB attempts to answer this concern by stating first that economic weapons should not be counted nor measured then attempts to argue that the employers remaining in the multi-employer unit "have many economic weapons" yet names only one, the lock-out.

Finally, the Board's distinction between entering into final agreements fails totally to answer the *Beck* Court's argument in permitting impasse as an unusual circumstance, specifically, why the union's right should accrue first and why there shouldn't be parity in the number of economic weapons open to either party.

The *Beck* Court in unusually strong language and in very clear reasoning stated:

> The employer's right to withdraw during a bargaining impasse *cannot be made contingent upon the union's prior exercise of its right* to negotiate individual interim agreements. The rights of the parties should accrue simultaneously based upon the occurrence of an event which neither can manipulate (e.g., impasse). Were the rule otherwise, the parties whose right accrues first would be given a tremendous bargaining advantage and leverage. We recognize that to some extent, basing the right of withdrawal upon the existence of an impasse rather than of individual negotiations, contributes to instability within the context of multi-employer bargaining. Certainly, that is the result in this case. But we cannot avoid the conclusion that this additional incremental instability, however unfavorable to the policy aimed at the stabilization of these units, is a necessary concomitant of ensuring that the parties have equal rights and that the existence and implementation of such rights do not grant unfair advantage to either party, (emphasis added) *Beck Engraving* 90 LRRM 2089 and 2095.

The NLRB argues that an impasse can be manipulated by one of the parties simply by taking an extreme position. While this may be the case in some situations, it should be noted that such gerrymandering can be manufactured by *either* party, not just one as exists under the Board's "final agreement" theory. Thus one party is not given an advantage over another. Additionally, such an occurrence can presum-

ably be remedied by filing an unfair labor practice charge and if need be, by such expedient remedies as a 10(J) injunction. Further, by hinging withdrawal of either party on a good faith impasse, the desire to reach an agreement, knowing that withdrawal and/or individual agreements might occur at said impasse, may promote more vigorous and realistic bargaining on both sides similar to that found in "last best-offer" bargaining in the public sector.

Finally, the Second Circuit in *NLRB* v. *Association of Steel Fabricators* (582) F2d 135 2nd Cir. 1978) 99 LRRM 3150 adopted the *Beck* rationale stating:

> ". . . The objectives of collective bargaining would be ill-served by compelling employers to remain in the bargaining unit once it becomes clear that no progress is being made within that framework." *Steel Fabricators*, supra, at 3157.

The *Steel Fabricators*' arguments that bargaining is ill-served by compelling employers to remain in the bargaining unit once an impasse is reached is equally applicable to unions and follows the Board's enunciated policy that it will not require the parties to engage in fruitless bargaining sessions.

CONCLUSION

For the reasons enumerated in the *Beck Engraving* decision, this Court should continue to adhere to the concepts of parity. The Board's position, in its *Bonanno* reconsideration, is so blatantly unfair, contrived

and machinistic, it should be rejected on its face. In the place of this contrived policy, the *Beck* rationale of good faith impasse with all of the protections the Board has available to ensure good faith, should be adopted. This is the only reasoning that does not offer one side a greater advantage over the other. By allowing the union to decide if it is strategically beneficial to them to engage in interim agreements and to decide which employer(s), weak or strong, it will negotiate with on a separate basis so as to effectuate the greatest weakness in the employer's unit, promotes what the Labor Board attempts to avoid, fragmentation of the unit.

Withdrawal from multi-employer bargaining for either the employer or the union should be limited:

1. prior to the time for commencement of negotiations,

2. in the face of severe individual financial crisis,

3. or impasse.

Should the Court affirm the *Bonanno* decision from the Court below, the death knell for multi-employer bargaining may very well be sounded. The continued viability of such bargaining will be predicated on whether or not it can serve the needs of both the union and the employer members. If employers perceive that contracts could be negotiated that otherwise would not be the case because the union is given greater

bargaining strength, the attractiveness of group negotiations will be lost and, as was the case with the airline industry, multi-employer groups will cease to exist.

Dated: May 22, 1981.

HOYT & GOFORTH
By: RALPH B. HOYT
Attorney for Golden Bear Motors, Gil Ashcom Toyota and Berkely Lincoln Mercury

PROOF OF SERVICE BY MAIL—CCP 1013a, 2015.5

I declare that:

I am (a resident of/employed in) the county of Contra Costa, California. I am over the age of eighteen years and not a party to the within cause; my business/ residence) address is: 1910 Olympic Blvd., Suite 220, Walnut Creek, California 94596. On May 21, 1981, I served the within Amicus Curiae Brief on the Parties Entitled in said cause, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Walnut Creek addressed as follows:

SIDNEY A. COVEN
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I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on June 11, 1981, at Walnut Creek, California.

CHEROLYN J. ADAMS

APPENDIX

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SPECIALIZING IN
LABOR MANAGEMENT RELATIONS
AND ADMINISTRATIVE LAW

AREA CODE 617
523-6240

RECEIVED
MAY 21 1981
RALPH B. HOYT

May 18, 1981

Marcia Hoyt, Esquire
Hoyt & Goforth
1910 Olympic Blvd.-Suite 220
Walnut Creek, CA 94596

Re: Charles D. Bonanno
Linen Service, Inc.
v. NLRB, Case No.
80-931

Dear Ms. Hoyt:

Pursuant to your letter of April 29, 1981, and our subsequent conversation, please be advised that the petitioner in the above-captioned matter consents to the filing of an Amicus Curiae Brief in the above case as requested by your letter.

For your information the National Labor Relations Board is represented by the Solicitor General of the United States, Wade H. McCree, Jr., Department of Justice, Washington, D. C. 20530 and by William A. Lubbers, General Counsel, National Labor Relations Board, 1717 Pennsylvania Avenue, N.W. Washington D. C. 20570. Respondent Union is represented by James T. Grady, Grady & McDonald, 75 Federal Street, Boston, Massachusetts 02110.

Very truly yours,

Howard I. Wilgoren

HIW:ss

Exhibit A

U.S. Department of Justice
Office of the Solicitor General

Washington, D.C. 20530

May 7, 1981

Marcia H. Hoyt, Esq.
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RECEIVED
MAY 11 1981
RALPH B. HOYT

Re: Charles D. Bonnano Linen Service, Inc. v. NLRB, et al., No. 80-931

Dear Ms. Hoyt:

As requested in your letter of April 29, 1981, I hereby consent to the filing of a brief amicus curiae on behalf of Golden Bear Motors, Inc.; Toyota of Berkeley, Inc.; and Berkeley Lincoln Mercury, Inc.

Also, as requested in your letter, I am enclosing a list with the names and addresses of counsel for the employer and the union in the above-referenced case.

Sincerely yours,

Wade H. McCree, Jr.

Wade H. McCree, Jr.
Solicitor General

Enclosure

Exhibit B

Office-Supreme Court, U.S.
FILED
MAY 26 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-931

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

BONANNO LINEN SERVICE, INC., *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD

and

LOCAL 25, INT'L. BRO. OF TEAMSTERS, *Respondents.*

Upon Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF FOR THE GRAPHIC ARTS UNION EMPLOYERS OF AMERICA, A DIVISION OF THE PRINTING INDUSTRIES OF AMERICA, INC. AS AMICUS CURIAE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-931

BONANNO LINEN SERVICE, INC., *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD

and

LOCAL 25, INT'L. BRO. OF TEAMSTERS, *Respondents.*

Upon Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

---

BRIEF FOR THE GRAPHIC ARTS UNION EMPLOYERS OF AMERICA, A DIVISION OF THE PRINTING INDUSTRIES OF AMERICA, INC. AS AMICUS CURIAE

This brief on behalf of the Graphic Arts Union Employers of America, a division of Printing Industries of America, Inc., as *amicus curiae,* is filed with the written consents of the parties pursuant to this Court's Rule 36. The *amicus* supports the position of the Petitioner and urges reversal of the decision of the Court of Appeals for the First Circuit.

THE INTEREST OF THE AMICUS CURIAE

The Graphic Arts Union Employers of America, a division of the Printing Industries of America, Inc., is a national association representing approximately 3,500 graphic arts companies throughout the country. Its membership is comprised of unionized companies in the commercial printing industry, which employ almost 250,000 unionized workers. Although there are some large printing company members which employ several hundred or more employees, the industry is characterized by a vast number of small and medium sized companies staffed by from 3 or 4 employees to 25 to 50 employees. Over 80 percent of the firms in the industry employ fewer than 25 employees.

Members operating in metropolitan areas have traditionally negotiated with the various printing craft unions on a multiemployer basis. This practice continues, although in recent years an increasing number of companies have negotiated individual contracts in the face of radically changing technology and more specialized needs which differentiate them from their counterparts in the industry.

All of these companies negotiate with at least one labor organization. Since each of these unions has traditionally represented a particular printing craft, e.g., typesetters, pressmen, bindery workers, etc., it is not at all uncommon for even a small plant to bargain on a multiemployer basis with as many as three or four different unions.

The direct and immediate interest of the *amicus* herein lies in the fact that given the fiercely competitive nature of the industry and the fungible nature of the service performed, a multiemployer bargaining impasse and ensuing strike is tantamount to disintegration of multiemployer bargaining. Such bargaining ceases to be a stabilizing influence because, as customers of printers confronted with a strike or strike threat rush to non-unionized competitors to fulfill their printing needs, the continued existence of the group

members is sharply threatened. Indeed, many businesses simply do not survive the bargaining impasse and ensuing strikes, resulting in a loss of competition and the loss of employment by unionized workers.

In short, when deadlock occurs multiemployer bargaining fails of its purpose. Not only has bargaining ceased, but the union is then free to destroy the joint efforts of the multiemployer group by selectively striking only employers of its own choosing. Nevertheless, under the Board's rule, the remaining employers are not free to withdraw in order to conduct separate negotiations. The employers are thus trapped by Labor Board doctrine — in the name of multiemployer bargaining unit "stability" — in a situation of neither stability nor progress. They are prevented from pursuing individual negotiations no matter how likely the prospect that such negotiations on individual bases can bring about resolution of the dispute. Board doctrine, in short, has barred an alternative method of negotiations even though the present method has demonstrably not worked.

The problem is exacerbated when, as often happens in the printing industry, the union selects favored multiemployer unit members during a post-impasse strike and individually offers those employers "interim" agreements. These agreements, by which the union puts favored employers back in business to reap the work of other employers not so favored by the union, drives a wedge of such explosive proportions into the multiemployer unit as to disintegrate it. These interim agreements take various forms in the printing industry, but their destabilizing effect is the same. They are the antithesis of group bargaining, and their use should release the remaining employers from continued mandatory participation in multiemployer bargaining. This singling out of some employers by the union in all fairness mandates the correlative right of the other employers — endorsed by the Second, Third, Fifth, Eighth, and Ninth Cir-

cuits, but rejected by the Court below — similarly to negotiate on an individual basis.

Employers in the printing industry are, moreover, particularly vulnerable to the imbalance in the economic weapons created by the Board's approach. As the Court in *N.L.R.B.* v. *Beck Engraving Co., Inc.*,[1] pointed out, unions have both the selective strike and individual negotiations at their disposal, while the employers have only the lockout. The *Bonanno* Court cited such additional employer "weapons" as stockpiling inventories, changing contract schedules and transferring work from one plant to another. Given the short, inexorable deadlines for printing (e.g., magazines, advertisements), the printer obviously can neither stockpile nor change contract deadlines. Given the vast number of small companies with single plants, there is no place to divert the work.

To be sure, there is nothing in the Act which requires that the economic strength of the competing parties be equal. But that proposition is a far cry from licensing the Board to establish a rule, as it has in this matter, which is calculated to *create* an imbalance. The lack of even-handed treatment by the Board is, accordingly, particularly devastating and grossly unfair to employers in the printing industry.

SUMMARY OF ARGUMENT

1. Where the National Labor Relations Board has acted at odds with a statutory mandate or has frustrated the Congressional policy underlying a statute, the deference usually accorded administrative tribunals by reviewing courts no longer comes into play. *N.L.R.B.* v. *Brown*, 380 U.S. 278, 291 (1965). The latest version of the Board's rule governing the rights of the parties to multiemployer bargaining in the event of impasse falls squarely into that category. The Con-

[1] 522 F.2d 475 (3rd Cir. 1975).

gressional rationale for supporting multiemployer bargaining, as this Court recognized in *Buffalo Linen,*[2] was that such bargaining "was a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining."

The Board has perverted the statutory purpose of "promoting labor peace", i.e., resolving disputes, by its slavish devotion to a doctrine of its own invention, that of maintaining bargaining unit stability. Desirable as this latter goal may appear to be at first blush, it can be justified only if it "promotes labor peace" and results in "strengthened collective bargaining." Otherwise, the underpinning for Congressional support of multiemployer bargaining is lost.

The Board, however, has never forged that connecting link in the matter at hand, for the obvious reason that a bargaining impasse with or without selective strikes by the union involved can scarcely be viewed rationally as an indication of labor peace or as strengthened collective bargaining. What the Board has done instead is to rely on bargaining unit stability as its own justification, and by that reasoning has discarded the primary *statutory* purpose of dispute resolution. On that ground alone the Board's decision and rationale are not entitled to judicial deference.

Moreover, the Board's current position on withdrawal is further discredited by the Board's own vacillation on the matter over the years. For a quarter century — from 1950 to 1973 — it adhered to its holding in *Morand Bros. Beverage Co.*[3] that parties were free to bargain individually after an impasse had been reached in multiemployer bargaining. It seemed to digress from that pronouncement in dictum in a 1964 decision and seemed to return to it in 1971. Not until its *Hi-Way Billboards, Inc.*[4] decision in 1973 did the Board

[2] *N.L.R.B.* v. *Truck Drivers Local Union No. 449,* 353 U.S. 87, 95 (1957).

[3] 91 NLRB 409 (1950), enforced in part and remanded in part, 190 F.2d 576 (7th Cir. 1951).

[4] 206 NLRB 22 (1973).

hold that withdrawal and unilateral bargaining were *not* permitted in the event of impasse. Despite its pronouncements in *Hi-Way Billboards* and its progeny, to this day the Board has not overruled or reconciled its *Morand Bros.* ruling. In light of the Board's checkered history of decisions on the impasse issue, its pronouncement now is not entitled to judicial deference.

2. As the courts of appeals of five judicial circuits have recognized, the Board's current doctrine is misconceived. Essentially the Board has disregarded the Act's stated policies of encouraging collective bargaining and avoiding industrial strife. The vice lies in the Board's blind devotion to the standard it enunciated in *Retail Associates, Inc.*[5], a standard which upon analysis is wholly irrelevant to the issue of rights accruing at impasse. In *Retail Associates* the Board, in order "to ensure stability of such bargaining relationships," restricted withdrawal after multi-employer bargaining had commenced to those situations involving "unusual circumstances." The syllogism is impeccable: withdrawal is permitted only in unusual circumstances; impasse occurs often enough so as not to be an unusual circumstance; hence withdrawal is not permitted in the case of impasse. But whether or not impasse is an "unusual circumstance" obviously begs the question. The glaring oversight on the part of the Board is that stability in a bargaining relationship is not an end in itself, but simply a means to achieve resolution of bargaining disputes. If a particular bargaining relationship fails to achieve that resolution, there is every reason to permit alternatives that may better accomplish the statutory purpose. As the Court of Appeals for the Second Circuit recognized in *N.L.R.B.* v. *Independent Association of Steel Fabricators, Inc.*, 582 F.2d 135, 146 (1978): ". . . the objectives of collective bargaining would be ill-served by compelling employers to remain in the

[5] 120 NLRB 388 (1958).

bargaining unit once it becomes clear that no progress is being made within that framework."

3. The right of an employer to withdraw from multiemployer bargaining becomes all the more compelling in the common situation where a union after impasse strikes the unit but selectively offers "interim agreements" to employer members of its choosing. Such interim agreements come in a variety of forms, but all have the same purpose: to fragment the group so the union can deal with the remaining members after they have been reduced to a weakened state. As the court in *Beck* put it, ". . . allowing individual negotiations even on an interim basis is tantamount to a rejection of the existence of the multiemployer bargaining unit." 522 F.2d at 483.

The vice of the interim agreement is that it shatters the foundations upon which multiemployer bargaining is based. Employers band together because of their assessment that their strength is enhanced when they act collectively. Plainly if an employer did not believe that joint action would be to his benefit he would exercise at the outset his prerogative to bargain on his own. His consent to multiemployer bargaining, in short, is based on the assumption that all employers will be treated the same in a common undertaking. Since the very purpose of the interim agreement is to differentiate among the members of the multiemployer group, the use of such agreements destroys the premise upon which employer consent to multiemployer bargaining was given and hence is inherently destructive of the multiemployer unit itself.

In a similar vein, the employers' consent to multiemployer bargaining is also based on the expectation that no employer in the course of bargaining will gain a competitive advantage over his counterparts. This premise, too, is exploded by the interim agreement. Particularly where the product is fungible, as in the printing industry, permission to return to work — and to capture the work of competitors

who are still on strike — gives the employer favored by an interim agreement an enormous competitive advantage. Plainly the integrity of the multiemployer unit, and the basis of the employers' initial consent to multiemployer bargaining, are substantially eroded by the union's solicitation of such agreements.

At bottom, the Board's rule violates its professed doctrine that unions and employers should have equal rights of withdrawal. Incredibly, the Board rationalizes its decision largely on the ground that the union — despite a selective strike and/or solicitation of interim agreements — has not withdrawn from multiemployer bargaining but in fact has facilitated such bargaining by taking action to break the impasse and resume group bargaining. The Board seems blind to the fact that any such breaking of the impasse is accomplished only by carving out some members of the group at the expense of those who remain, so that the portion of the group that remains is severely weakened.

The fact that all may eventually be bound by the same contract is irrelevant. The salient point is that any such agreement is reached only because the union has insisted on dealing in piecemeal fashion with the employers comprising the multiemployer group. Unless the Board is to scrap any notion of even-handed treatment, fairness dictates that since the union in such circumstances has engaged in individual bargaining, all of the employers should be released from any mandatory commitment to multiemployer bargaining.

ARGUMENT

1. The Position Of The National Labor Relations Board Is Not Entitled To Judicial Deference

As this Court has repeatedly made clear, "The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia * * *." *American Ship Building Co.* v. *N.L.R.B.*, 380 U.S. 300, 318 (1965). The Courts "are not obliged to stand aside and rubber-stamp their affirm-

ance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *N.L.R.B.* v. *Brown*, 380 U.S. 278, 291 (1965). See also, *Volkswagenwerk Aktien* v. *Federal Maritime Commission*, 390 U.S. 261, 272 (1968).

We are well aware of this Court's assertion in *Buffalo Linen*[6] that Congress entrusted "primarily" to the Board the responsibility of resolving conflicting legitimate interests in multiemployer bargaining cases, "subject to limited judicial review" (footnote omitted). The Board, accordingly, can be expected to contend that its view of the legal consequences of impasse in a multiemployer bargaining context is entitled to deference by the Court. Such a contention is wrong. The Board's view rejecting impasse as a ground for withdrawal from multiemployer bargaining — a view which has been rejected by the Second, Third, Fifth, Eighth and Ninth Circuits[7] — is not entitled to deference because it flouts the stated intent of Congress and has been the subject of repeated reversals of Board position.

Where the Board has erred is in giving preeminence to a Board-invented policy of maintaining bargaining unit stability, at the price of subordinating the primary *statutory* purpose of dispute resolution. The Board has blindly pursued this goal of bargaining unit stability even though in the event of impasse the multiemployer unit's usefulness as a vehicle of dispute resolution has collapsed. By adopting a standard which fails to effectuate and indeed contravenes a

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[6] *N.L.R.B.* v. *Truck Drivers Local Union No. 449, (Buffalo Linen Supply Co.)*, 353 U.S. 87, 96-97 (1957).

[7] *N.L.R.B.* v. *Independent Association of Steel Fabricators, Inc.*, 582 F.2d 135 (2nd Cir. 1978); *N.L.R.B.* v. *Beck Engraving Co., Inc.*, 522 F.2d 475 (3rd Cir. 1975); *N.L.R.B.* v. *Hi-Way Billboards, Inc.*, 500 F.2d 181 (5th Cir. 1974); *Fairmont Foods Co.* v. *N.L.R.B.*, 471 F.2d 1170 (8th Cir. 1972); *N.L.R.B.* v. *Associated Shower Door Co.*, 512 F.2d 230 (9th Cir. 1975); *H & D Inc.* v. *N.L.R.B.*, _____ F.2d _____, 105 LRRM 3070 (9th Cir. 1980).

plain purpose of the Act, the Board has violated the principles underlying the deference doctrine and, therefore, forfeits any right to rely on it before a reviewing Court.

In addition to subverting an overriding Congressional objective, the Board's current administrative construction is not entitled to judicial deference because of the contradictory positions the Board has taken on this matter over the years. Compare *Espinoza* v. *Farah Manufacturing Co.*, 414 U.S. 86, 94 (1973); *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 141-146 (1976).

The checkered history which the Board brings to the Court begins with its decision in *Morand Bros. Beverage Co.*, 91 NLRB 409 (1950), enforced in part and remanded in part, 190 F.2d 576 (7th Cir. 1951). In *Morand*, 91 NLRB at 417, the Board squarely ruled that the parties were "free to bargain [individually] after an impasse had been reached in association-wide bargaining." The Board adhered to this position for well over a decade.

While its *Morand* doctrine was still in effect, the Board issued its decision in *Retail Associates, Inc.*, 120 NLRB 388, 394 (1958), declaring that stability in the multiemployer bargaining relationship was desired and that once multiemployer bargaining commenced, unilateral withdrawal by either any party was not permitted absent "unusual circumstances." The Board in *Retail Associates* did not question its *Morand* decision nor did it address whether impasse was within the category of excusable "unusual circumstances." In 1964, again without questioning *Morand*, the Board suggested in *Ice Cream Council Inc.*, 145 NLRB 865, 870 (1964) (*dictum*) that impasse would not privilege unilateral withdrawal from multiemployer bargaining, only to imply later in *P.H.C. Mechanical Contractors,* 191 NLRB 592, n. 1 (1971), that it would.

Indeed, even in its 1973 pronouncement in *Hi-Way Billboards, Inc.*, 206 NLRB 22, when it held for the the first time that impasse did not privilege unilateral withdrawal

from the multiemployer bargaining unit, the Board did not question, nor for that matter even take cognizance of, its prior landmark decision in *Morand*. It was not until the Board unsuccessfully sought enforcement of its *Hi-Way Billboards* decision in the Court of Appeals that its appellate counsel, in an impermissible[8] *post hoc* rationalization, argued that *Morand* implicitly was overruled by *Retail Associates*. Indeed, to this date the Board has not overruled or reconciled its *Morand* decision which is, of course, inescapably at odds with its decision in the case at bar. Given this history, it is respectfully submitted that there simply is no basis for judicial deference to the Board's position on this issue.

II. The Board Has Improperly Subordinated The Congressional Policies In Favor Of Collective Bargaining And Avoidance Of Industrial Strife In Favor Of Its Own Goal Of Stability In Multiemployer Bargaining

The Board's position that even a state of impasse does not permit withdrawal from multiemployer bargaining has worked a severe dislocation in the Act's stated policies of encouraging collective bargaining and avoiding industrial strife. For it has subordinated these express statutory policies in favor of imposing its own goal of "stability" in multiemployer relationships. This announced objective not only improperly subordinates the Act's stated policies; it is inconsistent with them as well.

The foundation upon which the Board's approach below rests is its *Retail Associates* decision. In *Retail Associates* the Board concluded that "the stability requirement of the Act . . ." compels restricting the right of unilateral withdrawal from multiemployer bargaining to those cases involving "unusual circumstances." 120 NLRB at 393, 395. Then, in a bootstrap argument of the worst order, the Board cranked impasse into the "unusual cir-

[8] *N.L.R.B.* v. *Metropolitan Life Ins. Co.*, 380 U.S. 438, 444 (1965).

cumstance" rationale. A bargaining impasse was said to be a common occurrence. Hence, the logic runs, because impasse is not "unusual", it can provide no basis for withdrawal from multi-employer bargaining.

This circular reasoning defies both logic and reality, for regardless of whether or not a bargaining impasse is an unusual event, to formulate the issue in those terms is of no value in assessing whether the bargaining deadlock amounts to failure of the multiemployer vehicle as a means of achieving a bargained resolution of disputes. Moreover, it does nothing to achieve the correlative statutory purpose of avoiding industrial strife.

Further, the very underpinning of *Retail Associates* is fallacious. For, there is no "stability requirement of the Act"[9] that justifies locking employers into a multiemployer framework of dispute resolution where, as here, a contract has expired and the bargaining deadlock has frustrated the bargaining process.

This "stability requirement of the Act," asserted by the Board in *Retail Associates* is a fiction, the source of which it has never explained. To be sure, the Board and courts historically have recognized that bargaining relationships should be insulated from challenge in certain situations prior to contract expiration. For example, where a union is newly certified, the employer cannot challenge majority status for a one-year period as an excuse for not continuing negotiations. *Ray Brooks* v. *N.L.R.B.*, 348 U.S. 96 (1954). Similarly, during the critical two-month period before the expiration of a contract, the Board will dismiss an election petition filed by a rival union[10] or a decertification petition filed by employees, or an employer petition.[11]

However, in order to effectuate statutory objectives, the Board routinely permits destabilization of ongoing

[9] *Id.*, 120 NLRB at 393.

[10] *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1000 (1958).

[11] *Nelson Name Plate Co.*, 121 NLRB 1027, 1028 (1958).

negotiations *after* a contract has expired. Thus, for instance, after a contract has expired the Board *forbids* continued negotiations if a rival union files a representation petition covering the unit.[12] Similarly if employees file a decertification petition, the Board *requires* an employer to cease negotiations.[13] Likewise, it will permit unilateral suspension of negotiations if the employer objectively believes that the union has lost its majority status.[14] In short, the Board commonly will destabilize ongoing bargaining relationships after a contract has expired in order to accommodate statutory purposes which are superior to "stability" in bargaining relationships.

In contrast, what we are seeking is an alternative method of bargaining, not its curtailment. In the event of impasse, the option of bargaining on either an individual basis or a multiemployer basis is far less intrusive to the bargaining process than the procedures the Board itself has traditionally allowed in the examples discussed above. The Board has expressly recognized as much in its landmark *Morand* decision, yet has inexplicably continued to ignore its pronouncement there despite the repeated invitations of the courts of appeals[15] to come to grips with it. Thus, as the Board explained in *Morand, supra*, 91 NLRB at 416, 418-419 (the Board's emphasis):

* * *

> Finally, the Respondents contend for a construction of Section 8(b)(1)(B) which would preclude a union from seeking to enter into separate negotiations, in lieu of joint negotiations, *even after joint negotiations have collapsed*. Such a view is inconsistent with the basic

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[12] *Shea Chemical Corp.* 121 NLRB 1027, 1028 (1958).

[13] *Telautograph Co.*, 199 NLRB 892 (1972).

[14] *United States Gypsum Co.*, 143 NLRB 1122 (1963).

[15] *N.L.R.B.* v. *Hi-Way Billboards Inc., supra*, 500 F.2d at 184; *N.L.R.B.* v. *Beck Engraving Co., supra*, 522 F.2d at 483; *N.L.R.B.* v. *Fairmont Foods Co., supra*, 471 F.2d at 1172.

policy of the Act to encourage the practice and procedure of collective bargaining, as it would prevent the parties to a labor dispute from exhausting the possibilities of settling their dispute by *collective bargaining rather than economic attrition*. We do not believe, and are not prepared to hold, that Congress intended Section 8(b)(1)(B) to curtail collective bargaining in this fashion.

* * *

Balancing the instability resulting from the collapse of negotiations on a multiemployer basis against the benefits to be derived from further collective bargaining on a single-employer basis, we conclude that, in this case, to ensure the fullest freedom in exercising the collective bargaining rights guaranteed to employees single-employer units could be found appropriate (footnote omitted).

* * *

Here, however, there was no attempt by the Local to substitute unilateral action or individual bargaining for collective bargaining, but only to substitute for one type of collective bargaining (association-wide) another type of collective bargaining (on a single-employer basis). Thus, the Local's conduct, far from being in derogation of the statutory policy may well have served to effectuate that policy.

* * *

There is no basis for prohibiting an alteration in bargaining from a multiemployer to an individual basis after a contract expires and impasse occurs. Certainly the Act itself expresses no preference for multiemployer bargaining over individual bargaining. The only preferences of the Act are to encourage collective bargaining and thereby avoid industrial strife. Those goals are achieved through individual bargaining no less than through multiemployer bargaining.

Yet the Board has locked employers into continued multiemployer bargaining which has failed and thereby in-

vited resort to economic force while prohibiting peaceful resolution of the dispute through individual negotiations. Contrary to its statutory mandate, the Board has irrationally sacrificed bargaining and encouraged industrial strife in order to achieve its own inflexible objective of stability in multiemployer bargaining relationships. In so doing, the Board improperly has displaced the goals of Congress with its own.

III. A Union's Interim Agreements With Multiemployer Bargaining Unit Members Mandate The Right Of Other Employer Members To Withdraw From The Multiemployer Bargaining Unit And Also Bargain Individually

A union's unilateral decision to enter into separate "interim" agreements with only certain members of a multiemployer bargaining unit is so antithetical to multiemployer bargaining that such action must, as a matter of sound national labor policy, authorize a similar unilateral right on the part of the remaining employers to withdraw and negotiate separately.

The printing industry is not unfamiliar with these "interim agreements" and their destructive impact on multiemployer bargaining.[16] Such agreements take many forms. Some, such as the version used by a Michigan printing union (attached hereto as Supplemental Appendix pp. SA 1—SA 4) provide for acceptance of the union's last offer, subject to later revision in light of the ultimate agreement reached by the union with the remaining weakened bargaining unit members. Others, such as the version used by a Washington, D.C. printing local (attached hereto pp. SA 4—SA 6), are actually separate agreements subject to revision to incorporate any provisions in the subsequent multiemployer agreement which are more favorable to the

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[16] Indeed, they are generally referred to in the industry as "white papers" — so called because they signify surrender to a union's whipsawing tactics.

signatory employer, but not those which are more onerous. Other varieties continue the expired contract pending the signatory employer's agreement to subscribe to the ultimately negotiated multiemployer agreement.[17]

Irrespective of their variety, these interim agreements all serve the same purpose. By permitting employers of their choosing to return to work (and thus be able to solicit the customers of those employers still on strike), the unions are fragmenting the multiemployer group so as to deal only with those who are left in a weakened state. The union's solicitation of such agreements is totally inconsistent with multiemployer bargaining and destructive of the premises upon which such bargaining was entered. Accordingly, the union's use of interim agreements with respect to some employers must permit those other unit members who desire withdrawal to escape from multiemployer bargaining. This conclusion is compelled by several reasons, discussed below.

First, entry into multiemployer bargaining is, from the beginning, consensual. As a practical matter, employers arrive at their decision to enter—or not enter—multiemployer bargaining by making an assessment of the strength they can anticipate by joining collectively with other employers. Obviously if an employer was not satisfied with the perceived collective strength achieved by being bound with certain other employers in this common undertaking, it would not consent to join in the first place and would undisputedly be free to negotiate its own agreement. In short, then, consent to join multiemployer bargaining rests upon reliance that all will be treated the same in a common undertaking.

Interim agreements fundamentally destroy that premise, by permitting the union unilaterally to change the basis upon which that consent was given. By so undermining the foundation upon which multiemployer bargaining was entered, the use of interim agreements works a revocation of

[17] Compare *PHC Mechanical Contractors*, 191 NLRB 592 (1971), and *Sangamo Construction Co.*, 188 NLRB 159 (1971).

that consent so as to enable the other employers to revert to individual bargaining.

The Board itself implicitly has recognized as much. Thus, in *Pacific Coast Association*, 163 NLRB 892 (1967), as interpreted in *Hi-Way Billboards, Inc.*, 191 NLRB 244, 245 (1971), the Board ruled that a union's partial withdrawal from multiemployer bargaining *before* the commencement of bargaining did not unfairly whipsaw the remaining members because they, at that time, also were allowed to withdraw unilaterally. The same line of reasoning attaches to a change in the premise upon which employer consent was given where the union unilaterally effects a change in the composition of the bargaining unit *after* bargaining starts. The employer should accordingly be free to negotiate individually because the union's action pervasively changes the predicate upon which the employer's consent initially was given.

Second, a union's unilateral use of interim agreements destroys another foundation on which employer acquiescence in multiemployer bargaining rests. One of the reasons why employers enter multiemployer bargaining is to avoid being placed at a competitive disadvantage by any other employer. Yet the interim agreement explodes that very foundation, for it allows the union at its option to select a favored employer and put it back to work. The favored employer obtains an enormous competitive advantage—in terms of an overflow of business—which the unblessed employer, who is not offered the interim agreement, cannot acquire. The problem is particularly serious in the printing industry because, due to the fungible nature of the product, the unfavored employer has no choice but to watch his work be channelled, perhaps permanently, to the favored employer operating under the interim agreement. The surge of work which suddenly flows to the holder of an interim agreement gives him a lasting competitive edge, even if all employers ultimately sign a contract with uniform terms.

The Board has never grasped that compelling reality.

Third, the Board's sanction of interim agreements is at odds with its own professed doctrine that unions and employers should have equal rights of withdrawal from multiemployer bargaining. *Evening News Assn.*, 154 NLRB 1494 (1965), *enf'd. sub nom., Detroit Newspaper Publishers Ass'n.* v. *N.L.R.B.*, 372 F.2d 569 (6th Cir. 1967). Allowing the union the unilateral right to select a multiemployer unit member for separate negotiations—whether "interim" or otherwise—while depriving other unit members of the same right to opt for individual negotiations, is fundamentally inconsistent with the *Evening News* doctrine to which the Board claims adherence.

The arguments advanced by the Board in favor of allowing use of interim agreements with some unit members, but without any correlative withdrawal rights accruing to other unit members, do not withstand scrutiny. The Board argued below that interim agreements—or at least the two varieties it considered in *Sangamo* and *PHC, supra*—are not antithetical to group bargaining because (1) they are said to facilitate breaking an impasse and resumption of unit-wide bargaining; and (2) all employers assertedly have a stake in the final outcome of the multiemployer bargaining. *Bonanno, supra,* 243 NLRB 140 (1979). The first point rests upon "means are justified by the ends" reasoning which is inconsistent with the policies of the Act; the second point is simply specious.

To the extent that interim agreements facilitate the breaking of an impasse and the resumption of multiemployer bargaining, they accomplish this goal only by fracturing the cohesiveness and destroying the strength of the multiemployer group. This is obviously the case because the entire thrust of a union's solicitation of interim agreements is to carve out certain employers and use them as bargaining leverage against their counterparts. Not only is the group substantially weakened by the removal of certain employers,

but at the same time inexorable pressure is created upon the remaining weakened members to settle at any cost to recapture the work suddenly flowing to the interim agreement holders. Not having the right to insist similarly on an individual agreement, the remaining employers find themselves locked into a fractured bargaining structure to which they never consented at the outset of bargaining. The Board's notion that interim agreements facilitate the breaking of an impasse, if true at all, is true only because the Board has sanctioned a device which traps a portion of the original group into continued group bargaining with no means of escape. In effect, they are locked into multiemployer bargaining, but in a different unit from that which they originally agreed to join. The Board has vested a right in the union, enabling it to bargain on an individual basis, while inequitably denying the same right to employers.

Finally, the Board's assertion that interim agreements are consistent with group bargaining because the interim agreement holder has a stake in the final multiemployer agreement, is not credible. To the contrary, the signing of an interim agreement is a disclaimer of any such stake because the employer has removed himself from the negotiating process. The inflow of new business, which cannot be performed by other struck members, may well be so great that the increased cost of labor becomes inconsequential to the interim agreement holder. In any event, he remains secure in the knowledge that the other employer members who are denied access to such individual negotiations, will not gain any competitive advantage over him when, in their weakened states, they finally acquiesce in a new contract. This is particularly true in the case of the employer who signs an agreement such as the one appearing on pp. SA 4-6, which gives him the benefit of more favorable terms in the multiemployer agreement, but relieves him of any more onerous terms. Thus, as a practical matter, the "stake" that the in-

terim agreement holder has in the final contract is basically a no-risk proposition.

Irrespective of his "stake" however, he is no longer *participating* in group bargaining. He has effectively been removed from the group through unilateral union action, in stark contrast to the other employers who, in a substantially weakened state and at a competitive disadvantage, have no choice but to remain locked into group bargaining.

CONCLUSION

For the foregoing reasons this Court should reverse the decision of the lower court with instructions that the occurrence of either impasse or use of interim agreements in the course of multiemployer bargaining privileges members of the multiemployer unit to withdraw and bargin with the union on an individual basis.

Respectfully submitted,

LAWRENCE T. ZIMMERMAN
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(202) 457-0260
Counsel For The Amicus Curiae

SUPPLEMENTAL APPENDIX

June 7, 1974

Mr. Douglas M. King
King Smith Company
818 W. Hancock
Detroit, Mi. 48201

Dear Mr. King:

Collective Bargaining Negotiations between the Graphic Arts Association of Michigan and GAIU 9L Detroit have failed to resolve the outstanding issues in dispute. The Union has no alternative but to acknowledge a complete breakdown of discussions and a total impasse in negotiations.

Under the circumstances the Union intends to engage in all necessary action required to protect the interests and rights of the members.

In view of the obvious impasse in negotiations the Union proposes to each individual Employer — who prefers to continue uninterrupted production in his plant and maintain peaceful labor management relations — that the Employer inform the Union immediately of his intent to agree to the terms and conditions outlined in the Union's proposal of June 6, 1974 (copy attached).

That settlement proposal will be available until Noon on Monday, June 10, 1974. At that time the Union proposal will be withdrawn and the Union will require a settlement containing more equitable terms and conditions.

Sincerely,

/s/ JOHN W. CARLSON
John W. Carlson
President
GAIU, Local 9L

JWC/sm
opelu42
afl-cio

cc: Shop Delegate

June 6, 1974

UNION PROPOSAL

DURATION:	2 years.
WAGES (RETROACTIVE)	.28 (CO/L)
	Plus
FIRST YEAR:	June 1, 1974 — 4 1/2% wage adjustment and continued Cost-of-Living — 4¢ per point paid August 1, 1974 and quarterly thereafter (Locked in May 31, 1976).
SECOND YEAR:	$10.00 across the board
FIRST YEAR:	Inequity raise for 38" Web.
	1st Pressman — 28¢
	2nd Pressman — 25¢
FIRST YEAR:	Apprentice starting $4.00 per hour.
ARTICLE 16:	Layoff Pay and Division of Work
	Back to old contract
HOLIDAY:	2nd year: Day after Thanksgiving

HEALTH AND WELFARE:

Maintenance of benefits. Additional benefits to be purchased from the $5.85 excess as follows:

1) Hospital confinement for mental or nervous or tuberculosis from 45 days to 120 days.
2) Increase weekly indemnity maximums and a 26 weeks @ $130.00 per week.
3) Increase Major Medical maximum to $10,000 and provide $500.00 out of pocket feature in calendar year.
4) Supplement for retirees and spouse 65 and over in conjunction with Part B of Medicare.

Section 8a.

Inexperienced employees, new to the industry, will be eligible for, Health and Welfare benefits after (30) thirty days and will be eligible for the unemployment benefits after (6) six months of employment.

BEREAVEMENT PAY:

First Year:

Include all tentative language agreements — back to old contract where no change has occurred.

It is understood and agreed that should the Union negotiate an Agreement with Employers employing a majority of the members of GAIU 9L Detroit (affected by this Contract) then that Agreement *will constitute the City Agreement* and this understanding *will be modified to coincide* with either the *lesser or greater terms* and conditions of the City Agreement as established.

For the Employer: For the Union:

_____ _____

* * *

[WASHINGTON D.C. AGREEMENT]

This agreement between Columbia Typographical Union and _____ shall become effective on _____ and shall remain in effect until February 10, 1980, or until both parties to the agreement voluntarily agree to modify its terms. The parties further agree that the terms and conditions of the Master Contract between Columbia Typographical Union and the Union Employers Division of the Printing Industry of Washington, exclusive of the provisions expressed in this Agreement, which were in effect from February 11, 1975, to February 10, 1977, shall govern the relations of the parties to this agreement.

Health & Welfare Contributions:

Effective	2/11/77	68¢ per hour
"	2/11/78	78¢ per hour
"	2/11/79	88¢ per hour

Pension Contributions:

Effective	2/11/77	32¢ per hour
"	2/11/78	36¢ per hour
"	2/11/79	40¢ per hour

Vacation:

Four (4) weeks vacation after ten (10) years of service.

Sick Leave:

Subject to the provisions of the Master Agreement, all employees with one or more years of continuous employment with the employer on the following dates shall be credited with days of sick leave as stated below:

2/11/77	3 days
2/11/78	3 days
8/11/79	4 days

Wages:

Effective	2/11/77	$318.50 per week
"	2/11/78	337.40 per week
"	2/11/79	347.55 per week
"	8/11/79	C-O-L Below

Effective the first pay day on or after August 11, 1979, the wage rate of each Journeyman and Apprentice shall be increased in accordance with the rise in the Consumer Price Index (1967 = 100), issued by the United States Bureau of Labor Statistics, but at no time will the rates fall below the wage scale appended to this Agreement. The cost-of-living adjustment will be calculated as follows:

For each one (1) full point by which the August, 1979, Index exceeds the February, 1979, Index level, there will be a four (4) cents per hour increase in the wage rate.

Any payment required under this Cost-of-Living section shall be due and payable as soon as practicable or, if unlawful as of August, 1979, if and when permitted by regulations issued by the relevant government agency.

No adjustments, retroactive or otherwise, shall be made due to any correction which may later be made in the published figures for the Index.

In the event that the Bureau of Labor Statistics shall fail to publish the Index, or shall change its base period, the parties shall meet to discuss and apply any such new Index and its application to the Cost-of-Living adjustment. If the parties are unable to agree, the matter shall be referred to arbitration.

In the event that the contract eventually agreed upon between the Columbia Typographical Union and the Union and Employers Division of the Printing Industry of Washington provides for wages, pension and health and welfare contributions, vacation, and sick leave less favorable to the printers covered by this Agreement, the Columbia Typographical Union will make appropriate adjustments in the terms of this Agreement. Such adjustment shall be prospective only and shall not require a repayment of any amounts by or on behalf of any employee.

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No. 80-931

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CHARLES D. BONANNO LINEN SERVICE, INC., *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD AND TEAMSTERS LOCAL UNION NO. 25, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSMEN AND HELPERS OF AMERICA, *Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF THE UNITED MINE WORKERS OF AMERICA, AMICUS CURIAE

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF THE UNITED MINE WORKERS OF AMERICA, AMICUS CURIAE

INTEREST OF AMICUS CURIAE*

The United Mine Workers of America ("UMWA") is an industrial union which represents coal miners throughout the United States and Canada for the purposes of collective bargaining and contract administration. The UMWA engages in collective bargaining with three multiemployer bargaining groups: the Bituminous Coal Operators Association, Inc., ("BCOA"), which

*All parties have consented by letter to the filing of this brief. These letters are on file with the clerk's office.

currently represents approximately 160 coal operators, including some of the largest coal companies in the United States; the Association of Bituminous Contractors, which represents over 300 construction companies, and the Anthracite Operators Wage Negotiating Committee which represents approximately 100 anthracite coal operators.

The employer in this case, Charles L. Bonanno, Linen Service, has petitioned this Court seeking reversal of the first circuit court's decision that impasse in negotiations does not justify an employer's withdrawal from a multiemployer unit. The UMWA views with grave concern any reversal of this decision. It believes that allowing an employer to withdraw from bargaining upon impasse, would severely weaken multiemployer bargaining.

Multiemployer bargaining, particularly in the coal industry, has had a positive, stabilizing influence and brought many benefits to the employees. Certainly the most far reaching of these benefits is the creation of multiemployer pension plans. It can not be disputed that without the multiemployer pension plans negotiated by the UMWA with the above mentioned bargaining units, many miners and construction workers would not be receiving a pension today or in the future. A multiemployer fund is essentially the only means of ensuring that an employee can continuously accumulate retirement benefits in the coal industry, where employees typically do not work continuously for one employer. Moreover, multiemployer funds have an added element of financial strength in that their contributions come from a number of employers who, as a group, are less likely than single employers to experience business difficulties. Additionally, it is likely that employers bargaining individually would resist negotiating a far reaching pension plan because of, among other things, the huge start-up costs.

To allow an Employer to withdraw from a multiemployer bargaining unit upon so usual and expected an occurrence as impasse, or a belief that impasse exists, would, the union submits, encourage the splintering of the bargaining unit and all the consequent problems which result. In the past, when the UMWA bargained on an individual and regional basis, employers vigorously resisted making agreements partially on the basis that in the highly competitive coal industry, an operator could not agree to be bound to a wage and benefit package without knowing what his competitors were going to do. The industrial instability which resulted from this type of bargaining is well documented in court decisions and history books.

SUMMARY OF ARGUMENT

The court below has properly held that an employer cannot withdraw from a multiemployer bargaining unit which it has freely joined, simply because an impasse has occurred. To hold otherwise, the union respectfully submits, would substantially weaken multiemployer bargaining by diluting the employer's commitment to the process. Without such a commitment, there is no longer the incentive for the employer to be part of the hard bargaining and necessary compromises which inevitably occur in multiemployer bargaining. Any weakening of multiemployer bargaining jeopardizes the benefits which have long been recognized to flow from this process, foremost of which, are numerous multiemployer pension plans.

ARGUMENT

Since December 10, 1980, when Bonanno petitioned for certiorari on the grounds that the court's decision below was contrary to five circuit courts' of appeal decisions, two of these circuits have changed their position,

citing with approval the decision below. In *NLRB* v. *Marine Machine Workers, Inc.*, 635 F.2d 522 (5th Cir. 1981) decided on January 30, the court stated that after negotiations have begun, the parties are required to honor their commitment to the process of multiemployer bargaining, which they freely elected. *Id.* An employer cannot use impasse as an excuse to breach this commitment. In *Tobey Fine Papers* v. *NLRB*, 107 L.R.R.M. 2221, 2222, n. 3 (8th Cir. 1981) decided April 20, while the Eighth Circuit did not face the issue directly, it stated that its decision in *Fairmont Foods Co.* v. *NLRB*, 471 F.2d 1170 (8th Cir. 1972) holding that an employer can withdraw from a multiemployer unit upon impasse, "can no longer be considered controlling in this circuit."[1]

I. WHEN AN EMPLOYER VOLUNTARILY BECOMES A PART OF A MULTIEMPLOYER BARGAINING UNIT IN ORDER TO ENJOY ITS MANY BENEFITS, THE EMPLOYER IMPLICITLY AGREES TO BE PART OF A BARGAINING PROCESS THAT IS NEVER EASY, RARELY SHORT AND OFTENTIMES INCLUDES IMPASSE.

As the Fifth Circuit recently held, it is entirely proper for the National Labor Relations Board ("NLRB") to require parties "after negotiations have begun . . . to honor their commitment to the process of multiemployer bargaining, which they freely elected." *NLRB* v. *Marine Machine Works, Inc.*, 635 F.2d 522, 524 (5th Cir. 1981). The court further stated that a rule forbidding withdrawal upon impasse falls "well within the Board's broad discre-

[1] The court went on to hold that in this case the facts indicated that contrary to the employer's representations its withdrawal from the multiemployer bargaining unit was based on a belief that the union did not represent a majority of its employees and not on any belief as to the existence of an impasse.

tion to resolve the inevitable questions arising in the multiemployer bargaining context. See, *NLRB* v. *Truck Drivers Local Union No. 449* (Buffalo Linnen)," (citation omitted), *Id.* at 526.

This rule is based on the reality that there is nothing unusual or unforeseeable about an impasse in the context of collective bargaining. *Bonanno Linen Service, Inc.*, 243 N.L.R.B. No. 140 (1979), *enforced*, 630 F.2d 25 (1st Cir. 1980). As the NLRB has stated, "[t]he occurrence of a genuine impasse cannot be said to be an unexpected, unforeseen, or unusual event in the process of negotiations since no experienced negotiator arrives at the bargaining table with absolute confidence that all of his proposals will be readily and completely accepted . . . [w]ere we to hold otherwise, we would be denying the practical reality of collective bargaining negotiations." *Hi-Way Billboards, Inc.*, 206 N.L.R.B. 22, 23 (1973), *enforcement denied*, 500 F.2d 181 (5th Cir. 1974), *decision overruled, NLRB* v. *Marine Machine Workers, Inc.*, 635 F.2d 522 (5th Cir. 1981), *enf'g*, 243 N.L.R.B. No. 119 (1979). Consequently when an Employer joins a multiemployer bargaining unit seeking its many advantages, it also should accept as part of the bargain, the fact that bargaining will not always be easy and may oftentimes include an impasse. Allowing employers to withdraw the bargaining authorization freely given, upon impasse, allows employers to "reap the benefits of group bargaining without incurring any of its responsibilities." Murphy, *Impasse and the Duty to Bargain In Good Faith*, 39 Univ. of Pitt. L. Rev. 1, 59 (1977). Conflicts in negotiations inevitably arise, which can be resolved through time, bargaining, economic pressure, more bargaining and compromise.

Certainly this process is well illustrated by the recent coal negotiations for a successor agreement to the Na-

tional Bituminous Coal Wage Contract of 1978 which expired March 27, 1981. Talks began in earnest in January 1981 after some preliminary negotiations in the fall of 1980. *Wall Street Journal,* September 16, 1980 at 14, col. 2. The coal negotiations were characterized by long bargaining sessions, proposals, counter proposals, bargaining recesses, a strike, a tentative agreement which was rejected by the membership, and more bargaining.[2]

As the bargaining continued and no agreement was reached, rumblings began among various companies to the effect that their multiemployer bargaining group, the BCOA was not adequately representing their interests. In April 1981, Emery Mining Corporation ("Emery"), a major coal producer, sought to withdraw from the multiemployer bargaining unit. *Wall Street Journal,* April 27, 1981 at 18, col. 1. The BCOA and the UMWA resisted these attempts. Emery alleged, among other things, that an impasse had occurred. The UMWA maintained that no impasse had occurred and in any event, a withdrawal based on impasse alone was an unfair labor practice under the Act. This issue was not litigated as BCOA reached an agreement with the UMWA, to which Emery subsequently agreed to be bound.

The union submits, however, that "absent some constraints on the parties' freedom to withdraw from a multiemployer unit during the course of negotiations," as the court below recognized, splintering of the unit would occur and "the utility of this bargaining process would be

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[2] *Wall Street Journal,* January 26, 1981 at 14, col. 3; March 18, 1981 at 6, col. 2; March 19, 1981 at 2, col. 3; March 24, 1981 at 3, col. 1; April 2, 1981 at 2, col. 3; April 10, 1981 at 11, col. 2; May 11, 1981 at 10, col. 2; May 14, 1981 at 24, col. 1; May 18, 1981 at 6, col. 1, May 19, 1981 at 5, col. 1; May 26, 1981 at 7, col. 1; June 1, 1981 at 2, col. 3.

substantially undermined." *NLRB* v. *Bonanno Linen Service, supra* at 28. Although no wholesale defections from BCOA occurred during coal negotiations, it was due in large part, the union believes, to the present NLRB rules prohibiting withdrawal except for the occurrence of unusual circumstances, of which, impasse is not one.

II. MULTIEMPLOYER BARGAINING ESSENTIAL TO THE STABILITY OF BARGAINING WITHIN THE COAL INDUSTRY, AND LONG SUPPORTED AND ENCOURAGED BY CONGRESS, THE COURTS, AND THE NLRB SHOULD NOT BE WEAKENED BY ALLOWING AN EMPLOYER TO WITHDRAW FROM THE UNIT UPON IMPASSE.

A. Advantages of Multiemployer Bargaining

As this court has stated, Congress views multiemployer bargaining as "a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining." *NLRB* v. *Truck Drivers Union,* 353 U.S. 87, 96 (1957).

The benefits widely recognized to derive from multiemployer bargaining were summarized by the First Circuit below, *NLRB* v. *Charles Bonanno Linen Service, supra* at 28 (1st Cir. 1980). The court stated that "[m]ultiemployer bargaining offers advantages to both management and labor" by:

(1) Enabling smaller employers to bargain on an equal basis with a large union and avoid the competitive disadvantages resulting from nonuniform contractual terms.

(2) Encouraging both sides to adopt a flexible attitude during negotiations without fear that concessions will result in competitive disadvantage somewhere else.

(3) Enhancing the efficiency and effectiveness of the collective bargaining process by permitting

the union and employer to concentrate their bargaining resources on the negotiation of a single contract, and,

(4) Facilitating the development of industry-wide worker benefit programs that employers otherwise might be unable to provide.

In this regard, industry-wide benefits have been of particular value to employees in the coal industry. Without a multiemployer pension plan, most coal miners would not receive a pension. A multiemployer fund is essentially the only means of ensuring that an employee can continuously accumulate retirement benefits in the coal industry where employees typically do not work continuously for one employer. Moreover, multiemployer funds have an added element of financial strength in that their contributions come from a number of employers who, as a group, are less likely than single employers to experience business difficulties.[3]

The United Mine Workers of America has three multiemployer pension plans: the Anthracite Health and Welfare Fund covering anthracite coal miners; and the 1950 and 1974 Pension Trusts covering bituminous coal miners. The foregoing 1974 pension plan covers construction workers as well. Funding for these plans comes from royalties paid by employers who are signatories to

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[3] Congress supports and seeks to protect multiemployer pension plans. In enacting the *Multiemployer Pension Plan Amendments Act of 1980*, Pub. L. No. 96-364 codified, 29 USC §§ 1001, Congress specifically found that "the continued well-being and security of millions of employees, retirees, and their dependents are directly affected by multiemployer pension plans . . ." 29 USC § 1001(a)(3). Accordingly, Congress declared it to be the policy of the Act "to alleviate certain problems which tend to discourage the maintenance and growth of multiemployer pension plans. . . ." 29 USC § 1001(a)(4)(A).

the national Anthracite, Bituminous and Construction workers' contracts.

As of June 1978, the two largest of these pension trusts, the 1950 and 1974 plans had vested benefits of 2.1 and 2.2 billion dollars respectively. *United Mine Workers of America Health and Retirement Funds, Annual Report,* p. 22, 27 (1979). As the foregoing Annual Report properly points out, the payments of benefits from these funds are of course "dependent on the continuation of such Agreements [referred to above] or the periodic negotiation of new agreements." *Id.* It is this union's view that a reversal of the court's decision below would jeopardize these funds by making it easier for employers who contribute to these funds to withdraw from multiemployer bargaining units.

B. Multiemployer Bargaining Has Contributed To Industrial Stability In The Coal Industry

In the past, the prospect of weakening or discouraging multiemployer bargaining has been greeted with keen disfavor by Congress, in part because of the lessons learned from the coal industry. During congressional debates on an unsuccessful amendment to the Labor Management Relations Act to declare multiemployer bargaining illegal, several Congressmen exhorted their colleagues not to forget what such a law would mean to the coal industry. House debate, 80th Congress, First Session (1947), reprinted in 1 NLRB, *Legislative History of the Labor Management Relations Act,* 1947, (hereinafter "____ Leg. His. ____"):

> *Rep. Snyder.** * *I believe I am well within the facts when I state that to eliminate industrial-wide bargaining would largely throw the coal industry into chaos. Anyone who is familiar with the history of the coal industry knows that at one time negotiations

were based at the union level, later at the district level, and finally we had industrial-wide bargaining and industrial-wide bargaining has brought stability to that industry. 1 Leg. His. 718.

* * *

*Rep. Kelly.** * *I know something about what happened in years gone by when they did not have industry-wide bargaining in the coal industry . . . the southern operators . . . pa[id] a lower wage . . . until the industry-wide bargaining brought about a level that they both paid [the north and south]. So it helped the coal industry all over the country. 1 Leg. His. 764.

* * *

*Rep. Fulton.** * *[T]he southern operators wanted to pay the miners less. They were able to deal with local employees because the employees were not apprised of their rights of collective bargaining and they did not have the representation that was as experienced as they had in the northern fields. We paid a higher wage rate in the northern fields, and then it was always a fight. First there was the fight between the mine operators and the unions, and then the unions would join up with the mine operators in the North and fight the southern operators to get their wages higher. 1 Leg. His. 764.

And, New York Senator Robert F. Wagner stated in an article reprinted in the Congressional Record at the time that:

Cooperation between labor and management to promote industrial efficiency and employee security would be abruptly cut short by the incredible proposals to prohibit industry-wide bargaining.* * *It would bring back the cycle of wage and price cutting which was characteristic of the coal industry and other industries in the twenties and thirties, precisely because there was no Nation-wide organization and collective bargaining. 2 Leg. His. 936.

As the foregoing recognizes, centralized bargaining in the coal industry brought benefits to companies and employees alike. As Justice Goldberg observed in commenting on industry-wide coal negotiations, "[w]hile the negotiations have not always been easy and many difficult issues have arisen, the procedure for solving [collective bargaining problems] has gone from the earlier jungle-type economic warfare to the reasoned and rational process of the Conference table." *Local Union No. 189* v. *Jewel Tea Co., Inc.*, 381 U.S. 676, 731 (1965) (dissenting from *Pennington* v. *United Mine Workers of America*, 381 U.S. 657, 675 (1965).[4]

III. INDIVIDUAL EMPLOYERS COULD DISRUPT MULTIEMPLOYER BARGAINING BY THE VERY ACT OF LITIGATING THE QUESTION OF WHETHER IMPASSE HAS OCCURRED, EVEN THOUGH IMPASSE IS SUBSEQUENTLY FOUND NOT TO HAVE OCCURRED.

The union is always very concerned by a possible decision which raises the specter of increased litigation for unions and all the time, money and uncertainty such litigation entails. A rule allowing an employer to withdraw from a bargaining unit upon impasse presents just such a possibility, because impasse "is a concept not susceptible of precise definition" and a "temporary condition which is easily ended" by "nearly any occurrence suggestive of possible success in further negotiations." Murphy, *Impasse and the Duty to Bargain in Good Faith*, 39 Univ. of

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[4] For a more detailed discussion of the foregoing evolution of bargaining in the coal industry see the district court's decision in *Ramsey* v. *United Mine Workers of America*, 265 F.Supp. 388, 404-07 (D.C. Tenn. 1967), *aff'd* 416 F.2d 655 (6th Cir. 1969), *rev'd* 401 U.S. 302 (1971).

Pitt. L. Rev. 1, 2 (1977).[5] A multiemployer bargaining unit could be splintered, not by an actual impasse, but by an individual employer's mere contention that an impasse exists justifying its withdrawal. As the union attempts to keep the bargaining unit intact by filing unfair labor practice charges against the employer, the effectiveness of the bargaining unit, as a practical manner, is diminished. It may take two to three years to litigate unfair labor practice charges on this issue.

Even if the foregoing withdrawals and litigtion does not occur the possibility is always present for it to, which is just as bad. As a result the focus of bargaining shifts from a total commitment by the multiemployer bargaining unit to reaching an agreement with the union, to the realization that now there is a way out. As a consequence the bargaining process is further impaired and more impasses may occur than do presently. "[I]mpasse is

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[5] For example, impasse on a single issue generally does not suspend the obligation to bargain on other issues. *Chambers Mfg. Co.*, 124 N.L.R.B. 721 1959) *enf'd*, 278 F.2d 715 (5th Cir. 1960). Moreover, no real impasse can be reached where bad faith bargaining has taken place *Neon Sign Corp.*, 229 N.L.R.B. 861 (1977). Impasse can be easily broken by among other things one party changing its position. *Sharon Hats, Inc.*, 127 N.L.R.B. 947 (1960) *enf'd*, 289 F.2d 628 (5th Cir. 1961).

There is also a question as to whether the employer must demonstrate that impasse exists in fact, or merely that the employer had a good faith belief that it existed. In *Cheney California Lumber Co.* v. *NLRB*, 319 F.2d 375 (9th Cir. 1963), the court said the issue was, "did respondent have a reasonable cause to believe and did sincerely believe, that an impasse had been reached" and "not whether judged on basis of hindsight" an impasse had occurred. By contrast, the NLRB asks whether the Employer was "warranted in assuming further bargaining would be futile." *Alsey Refractories Co.*, 215 N.L.R.B. 785 (1974).

generally avoidable only through the willingness of the parties to compromise. Compromise will not be fostered to the extent that members of multiemployer bargaining associations see impasse as an event that will permit them to avoid or at least delay being bound by an unfavorable contract." Murphy, *Impasse and the Duty to Bargain in Good Faith,* at 58 and 59, *supra.*

CONCLUSION

This union has struggled since its inception to bring about widespread multiemployer bargaining in the coal industry. Its existence as discussed above, benefits workers, and employers alike. Multiemployer bargaining was not easy to obtain and certainly, it is not easy to maintain. Its continued existence is dependent upon a definite commitment from its participants. To allow, as petitioner advocates, an Employer to withdraw from the unit upon so usual an occurrence as impasse, means that the Employer does not need to commit itself to bargaining on a multiemployer basis. The union submits that continued viability of collective bargaining on a multiemployer basis, requires that withdrawal not be permitted based on impasse alone.

Respectfully submitted,

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